TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 251

PETER H. MILLER, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF FLORIDA, PETITIONER

vs.

THE STANDARD NUT MARGARINE COMPANY OF FLORIDA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 22, 1931

CERTIORARI GRANTED OCTOBER 19, 1931

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A [Caption omitted.]

1 In United States District Court for the Southern District of Florida, Jacksonville Division

THE STANDARD NUT MARGARINE COMPANY OF Florida, a Corporation, plaintiff
v.
PETER H. MILLER, INDIVIDUALLY AND AS COLLECTOR of Internal Revenue for the District of Florida, defendant
} In Equity No. ——

Bill of complaint

Filed Dec. 26, 1929

Plaintiff states as follows:

1. The plaintiff, the Standard Nut Margarine Company of Florida, is a corporation organized and existing under the laws of the State of Florida, with its principal office and place of business located at Jacksonville, Florida, and is a citizen of the United States of America and the State of Florida.

2. The defendant, Peter H. Miller, is a citizen of the State of Florida and a resident of the city of Jacksonville, and is collector of internal revenue for the district of Florida.

3. Plaintiff states that this suit arises under the Constitution and laws of the United States and involves the validity, construction, application, and enforcement of the act of Congress of August 2, 1886 (24 Stat. 209), as amended by the act of May 9, 1902 (32 Stat. 193), known as the oleomargarine law.

4. That this suit involves property rights of plaintiff in excess of three thousand ($3,000.00) dollars, exclusive of interest and costs.

5. Plaintiff further states that it is engaged in the manufacture and sale in interstate commerce of a nut product known as Southern Nut Product, manufactured and sold under its own distinctive name, said name not being in imitation of the distinctive name of any other product; that said name is accompanied on the same label or brand with the name of the place where it is manufactured or produced; and that said product contains no added poisonous or deleterious ingredients. Southern Nut Product is a mixture or compound consisting of cocoanut oil, peanut oil, salt, water, and harmless coloring matter, manufactured and sold for cooking, baking, and seasoning purposes; that said product, Southern Nut Product, is packed and sold only in one pound cartons, a sample of which is attached hereto and made a part hereof; that in the said manufacture of Southern

Nut Product plaintiff buys the materials so used in manufacturing same from a great many persons and firms located outside of the State of Florida where the product is manufactured, and sells and ships said product to a great number of firms and persons (too numerous to be set forth herein), located in many States of the United States outside of the State of Florida.

6. Plaintiff further states that it has engaged in the manufacture of Southern Nut Product at the location heretofore mentioned for two years, and maintains and operates a plant and offices in the said city of Jacksonville for the conduct of said business; and that in carrying on said business it has built up a reputation and standing for fair and honest dealing with its customers and others with whom it has done business.

7. Plaintiff further states that prior to engaging in the manufacture and sale of said Southern Nut Product an action at law had been brought against one Page, a collector of internal revenue of the United States for the district of Rhode Island, for the purpose of recovering from said collector taxes paid under protest by the Higgins Manufacturing Company on a product manufactured and sold by that company known as Nut-Z-All, which product was manufactured in the same way and of the same ingredients as Southern Nut Product is manufactured by plaintiff herein, and that after hearing the evidence submitted on behalf of both plaintiff and defendant, it was held by the court that the said product Nut-Z-All was not made in imitation or semblance of butter, nor when so made calculated or intended to be sold as butter or for butter—and hence under the law was not oleomargarine and not taxable as oleomargarine. For the convenience of this court, said decision may be found in volume 297 of the Federal Reporter at page 644.

8. Plaintiff further states that as a result of said decision, Andrew W. Mellon, Secretary of the Treasury of the United States, approved, and David H. Blair, then Commissioner of Internal Revenue of the United States, published and promulgated Treasury Decision 3590, which was the text of the above decision, and further informed all concerned that Nut-Z-All had been held by the court not to be oleomargarine and not taxable as oleomargarine.

9. Plaintiff further states that in June, 1924, an organization or association of oleomargarine manufacturers known as the Institute of Margarine Manufacturers, maintaining headquarters in Washington, D. C., made inquiry of the said Commissioner of Internal Revenue, David H. Blair, and Deputy Commissioner of Internal Revenue, R. M. Estes, as to the taxability of the said product Nut-Z-All, and that said Estes made reply as follows:

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER INTERNAL REVENUE,
Washington, August 20, 1924.

Nut-Z-All.
INSTITUTE OF MARGARINE MANUFACTURERS,
J. S. ABBOTT,
Secty., 1049 Munsey Building, Washington, D. C.

SIRS: Reference is made to your letters of June 18 and July 30, 1924, relative to the alleged advertisements and sale of "Nut-Z-All" by certain retailers as butter and as a substitute for butter, and requesting this office to take steps to bring the product within the classification of oleomargarine.

The product "Nut-Z-All" was held by this office taxable as oleomargarine, but the decision was contested in the case of
3 Higgins Manufacturing Company *v.* Page (297 Fed. 644), wherein this product was held by the court to be not made in imitation or semblance of butter and not taxable as oleomargarine. The court, having held the product to be not taxable as oleomargarine, the fact that retailers advertise and sell it as butter, or as a substitute for butter, would not render them or the manufacturers liable under the internal revenue law.

It is likely that the practice about which you complain is in violation of the statute of the States in which "Nut-Z-All" is being sold, and you may be able to obtain relief desired by applying to the State officials.

Respectfully,

(Signed) R. M. ESTES,
Deputy Commissioner.

MLN.

10. Plaintiff further states that on April 1, 1927, said Andrew W. Mellon and David H. Blair, notwithstanding the aforesaid decision in the case of Higgins Manufacturing Company *v.* Page, the issuance of said Treasury Decision 3590 based thereon, and the statement contained in the above letter to the said Institute of Margarine Manufacturers that the said product Nut-Z-All was not taxable as oleomargarine, all of which were given extensive publicity throughout the trade, endeavored by Treasury Decision 4006 to again declare products similar to Nut-Z-All taxable as oleomargarine if colored to look like butter.

11. Plaintiff further states that in July, 1927, the said Higgins Manufacturing Company, of Providence, Rhode Island, filed in the United States District Court, District of Rhode Island, a petition for a temporary injunction against Frank A. Page, collector of internal revenue for the district of Rhode Island, asking the court to restrain the collector of internal revenue from collecting a tax on Nut-Z-All similar products as on oleomargarine, which injunction was granted by his honor, Judge Lowell, of the district of Massachusetts,

on July 18, 1927, said injunction being in words and figures as follows:

District Court of the United States, District of Rhode Island

HIGGINS MANUFACTURING COMPANY

vs.

FRANK A. PAGE, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE for the Collection District of Rhode Island, et al.

The President of the United States of America, to Frank A. Page, Individually and as Collector of Internal Revenue of the United States for the Collection District of Rhode Island, and His Deputies, Agents, and Successors, Greetings:

Know ye, that in the above-entitled cause a motion for the issuance of a writ of preliminary injunction has been duly
4 made, and the said motion, upon due consideration, has been granted by the court and such injunction ordered to issue:

Now, therefore, you are hereby restrained and enjoined, pending the hearing and determination of this cause, or until the further order of this court, from collecting, or attempting to collect, from the plaintiff any pretended tax or imposition purporting to be levied or assessed against the plaintiff under said oleomargarine act (act of August 2, 1886, chapter 840, 24 Stat. L. 209, as amended by act of May 9, 1902, chapter 784, sec. 332, Stat. L. 194) on account of the manufacture and sale of Higgins Nut Product; from seizing any of the property of the Higgins Manufacturing Company because an alleged tax of ten cents per pound on Higgins Nut Product has not been paid thereon; from distraining, seizing, entering upon, or attaching, or commencing any forfeiture proceedings against the property of the plaintiff because an alleged tax of ten cents per pound on Higgins Nut Product has not been paid; from enforcing any of the remedies provided for the collection of internal revenue of the United States against the plaintiff, its property, officers, or agents, and from notifying wholesale or retail dealers dealing in Higgins Nut Product in the collection district of Rhode Island, that they will incur liability to a specific tax as dealers in artificially colored oleomargarine or from making public announcement that Higgins Nut Product is liable to a tax imposed on colored oleomargarine or that said product will be seized.

Witness my hand and the seal of the District Court of the United States for the District of Rhode Island, at Providence, this 23rd day of July, A. D. 1927.

[SEAL.] (Signed) ALICE PECKHAM, *Clerk.*

That at the time of granting said injunction Judge Lowell rendered an opinion which is in words and figures as follows:

"District Court of the United States, District of Rhode Island

"Equity No. 270

"HIGGINS MANUFACTURING COMPANY

"*v.*

"FRANK A. PAGE

"OPINION

"(July 18, 1927)

"LOWELL, J.: This bill in equity was brought to restrain the collector of internal revenue for the district of Rhode Island from collecting a tax, alleged to be due under an act of Congress relating to oleomargarine, on Higgins Nut Product. The defendant filed a motion to dismiss.

5 "In the year 1922 the defendant notified the plaintiff that he was going to collect a tax on the product known as Nut-Z-All after all of it which had been made had been exhausted. The plaintiff paid the tax on a small quantity of this compound, and sued to get it back. Judge Brown in a very careful opinion (Higgins Mfg. Co. v. Page, 297 F. 644) decided that the tax was not due as the act of Congress did not subject the plaintiff's compound to a tax. There was no appeal from this decision.

"The bill of complaint in the case at bar—the allegations of which are admitted by the motion to dismiss—alleges that the compound now known as Higgins Nut Product is the same as Nut-Z-All; that the way in which it is put up is the same, and that all the circumstances of the case are identical with the one decided by Judge Brown. The bill further alleges that the defendant has notified the plaintiff that on the first of October, 1927, he will collect a tax of 10 cents a pound on Higgins Nut Product under the oleomargarine statute. We have, therefore, a case where the collector of internal revenue for the district of Rhode Island is threatening to take action which the court for that district has held to be illegal.

"At the hearing it was contended by the defendant that under Revised Laws 3224 (Comp. St. 5947) the court had no power to restrain the collection of the tax. This raises a serious question. It is alleged in the bill—and admitted by the motion to dismiss—that if the tax is laid and collected the business of the plaintiff will be ruined, because in an action at law brought after paying the tax it cannot recover adequate damages. The tax is so high that the plaintiff cannot afford to manufacture the compound, pay the tax and sell the article, and the alternative is to stop making it and destroy an established business.

"It is true, of course, that except under extraordinary circumstances a court cannot interfere with the assessment and collection of a tax. (See Graham v. Du Pont, 262 U. S. 234, and cases cited.) But the Supreme Court of the United States has said in Hill v. Wallace (259 U. S. 44):

"'It has been held by this court in Dodge v. Brady (240 U. S. 122, 126) that section 3224 of the Revised Statutes does not prevent an injunction in a case apparently within its terms in which some extraordinary and entirely exceptional circumstances make its provisions inapplicable. (259 U. S. at p. 62. See also Acklin v. People's Sav. Assn., 293 F. 392, 394, Lafayette Worsted Co. v. Page, 6 F. (2nd) 399.)'

"It is true, as contended by the defendant, that the statement was not necessary for the decision of the case (see 159 U. S. at pp. 62 and 63), but the statement of the court deserves all the greater attention from that fact, as it evidently wished to draw attention to the matter.

"The case at bar seems to be one coming within the exception above stated by the Supreme Court of the United States. The circumstances are exactly the same as in Higgins Mfg. Co. v. Page, ubi supra. There has been no change in the congressional
6 statute relating to oleomargarine. The action threatened by the collector of internal revenue for Rhode Island is therefore in defiance of the decision of the court. This is an extraordinary situation and calls for the interposition of injunctive relief. If it is true—as contended by the defendant—that a tax may be collected, although it has been judicially determined to be illegal, the result will be that the taxing authorities are entirely above and beyond the law. Although the Supreme Court of the United States has held that a tax laid under an unconstitutional statute will not be restrained (see Bailey v. George, 259 U. S. 16), in that case there was a complete and adequate remedy at law. It should be noted also that the statute had not been held void until after the tax was assessed. The taxing power is essential to the existence of the Government, and the courts have rightly gone very far in holding that taxing authorities should not be interfered with. (Snyder v. Marks, 109 U. S. 189, and cases cited.) But in this case, where there is no adequate remedy at law, the court should have power to grant relief; otherwise the citizens will be more at the mercy of the departments of the National Government than is consistent with life in a free country. (Acklin v. People's Sav. Assn., 293 F. at p. 394.)

"Motion to dismiss denied."

12. Plaintiff further states that in July, 1927, the Baltimore Butterine Company, of Baltimore, Maryland, petitioned the Supreme Court of the District of Columbia for a temporary and permanent injunction against said Blair and Estes to restrain them from endeavoring to enforce said Treasury Decision 4006 against its nut product, Nu-ine, which was identical in content and appearance with plaintiff's Southern Nut Product and which was in content and

which was in content and appearance identical with Nut-Z-All. After hearing and due consideration Justice Jennings Bailey of that court granted an injunction pendente lite and rendered an opinion which is in words and figures as follows, to wit:

"I agree with the reasoning of the decision of Judge Lowell of the District Court of Rhode Island in Higgins Manufacturing Co. v. Page; that is one of the cases to which the Supreme Court referred in Dodge v. Brady (240 U. S. 122) of extraordinary and exceptional circumstances.

"The bill alleges that the substance Nu-ine involved in this case is the same as Nut-Z-All, which Judge Brown of the District Court held not subject to taxation under the oleomargarine act. Yet in spite of this judicial holding the defendant has attempted by a regulation to make all substances like to that involved in this suit taxable under the act. It is clear that the defendant by means of a mere regulation cannot enlarge the provisions of the act, and such a regulation cannot be enforced. There would be no end to litigation if the defendant should persist in levying a tax after the courts have held the tax invalid, and the injury to the plaintiff would be irreparable and the amount inascertainable.

7 "The injunction will issue as prayed, restraining, pendente lite, the defendant from enforcing Treasury Decision No. 4006 in so far as it may apply to Nu-ine."

On December 16, 1927, the same court, by Justice A. A. Hoehling, made said injunction permanent, the final decree being in words and figures as follows:

In the Supreme Court of the District of Columbia

Holding an Equity Court

THE BALTIMORE BUTTERINE COMPANY, A CORPORATION, PLAINTIFF

vs.

ANDREW W. MELLON, SECRETARY OF THE TREASURY; DAVID H. BLAIR, Commissioner of Internal Revenue; R. M. Estes, Deputy Commissioner of Internal Revenue, defendants

FINAL DECREE

This cause coming on for final hearing, the plaintiff moved that, upon the pleadings and law applicable, the injunction pendente lite heretofore issued be made permanent; thereupon counsel for both sides having been heard and the matter having been considered by the court,

It is, this 16th day of December, A. D. 1927, adjudged, ordered, and decreed that the injunction pendente lite heretofore issued in this cause be, and the same hereby is, made permanent.

By the court.

A. A. HOEHLING,
Associate Justice.

In December, 1927, Judge Lowell made permanent the temporary injunction theretofore granted against the said Frank A. Page, collector of internal revenue for the district of Rhode Island, as set out above. No appeals were taken by the Government from any of the above-mentioned decrees.

13. Plaintiff further states that, relying upon the said first decision in the case of Higgins v. Page, said Treasury Decision 3590, said letter of R. M. Estes, and the said injunctions set out above, it was warranted in believing that the question had been judicially determined and that such products were not oleomargarine and not taxable as such, and it therefore engaged in the manufacture of Southern Nut Product. To further safeguard its business, however, plaintiff made inquiry of defendant and was advised by letter that Southern Nut Product would not be taxable as oleomargarine, said letter reading in part as follows:

"The Standard Nut Margarine Company has the same privilege of making a compound of the kind in question without taxpaying same as oleomargarine as is being enjoined by those manufacturers who obtain favorable decisions from the courts.

8 Upon receiving this letter, plaintiff began the manufacture of Southern Nut Product and has continued its manufacture in the same manner and of the same ingredients.

14. Plaintiff further states that on or about May 13, 1929, the Hon. William H. Barrett, United States district judge for the Southern District of Georgia, in a case involving the question whether Southern Nut Product was an imitation of butter, decided that it was not an imitation of anything, saying:

"It must be borne in mind throughout that this article when placed in the streams of commerce by its manufacturer and when purchased by the consumer had nothing on its container to indicate that it was an imitation of anything, and certainly not of creamery butter. Instead of by implication or otherwise claiming to be the product of milk or cream it is affirmatively in its name indicated that it was derived from nut. Not only did its name thus affirmatively indicate that it was no imitation of creamery butter but in extenso the words on the carton declared 'This product is made from the very best vegetable fats and cannot be excelled for cooking, baking, and shortening.' The alleged elements of imitation are (a) it is in square cartons containing one pound, (b) the pound is divided into four quarter-pound cubes, and (c) it is colored exactly like creamery butter. It hardly could be contended that an article of food should not be sold in pound packages because some other article of food was sold in pound packages, and it could hardly be contended that the adoption of the plan of dividing a pound of food into four cubes preempted such practice as against all other food producers, and it can hardly be contended that the color of creamery butter, even though it were always the same (contrary to the evidence), would preempt it as against all other foods of such color. It does not appear in the 'conclusion,' nor was it urged at the hearing, that there was any reason

for any purchaser of a carton of Southern Nut Product to be deceived into thinking that it was creamery butter. Apparently the defendant and Attorney General dealt with this as a package, for the language of the finding is that 'it is an imitation in package of another substance.' It is at least doubtful whether the sale in packages of a substance manufactured and put into commerce so marked as to prevent any reasonable conclusion that it was intended as an imitation of another article of food would come under the ban of this act because perchance some purchaser might, either as purchased or in some other way, use it either as an imitation of or as a substitute for another article of food."

15. Plaintiff further states that notwithstanding all of the above facts, defendant has threatened and still threatens to collect a tax of 10¢ per pound upon Southern Nut Product as upon the manufacture of artificially colored oleomargarine, his authority for such action being a letter addressed to him by R. M. Estes, Deputy Commissioner of Internal Revenue, reading as follows:

9 MT-M-JHY.

Collector of Internal Revenue, Jacksonville, Fla.

The Standard Nut Margarine Company of Florida, 1427 Kings Road, Jacksonville, Fla., manufactures a so-called colored cooking compound under the name of "Southern Nut Product" which is held to be taxable as colored oleomargarine.

This office has no knowledge as to the quantity of this product which the said company has manufactured and sold and hence it has been necessary to make an estimate of its production. Enclosed will be found supplemental miscellaneous assessment list for April on which the manufacturer has been assessed the sum of $5,000.00 which covers the tax on 50,000 pounds estimated to have been produced during the month of January, 1929.

It is requested that the notice and demand on this assessment be delivered personally by a deputy collector and that he be instructed to make an examination of the books and records of the company to determine the exact quantity of the Southern Nut Product manufactured and sold from the time business was commenced to date, and to advise the company that the assessment will be adjusted to correspond thereto. This data should be forwarded to this office promptly and an additional assessment will be made. Should the deputy be refused permission to make an examination of the company's books and records, this office should be advised at once and further instructions will be issued.

If it becomes necessary to issue a distraint warrant on this assessment, it is requested that you communicate with this office before doing so.

All wholesale and retail dealers in Southern Nut Products and other so-called colored cooking compounds found on the market in your district should be reported for assessment on subsequent lists

unless they hold special tax stamps permitting them to sell colored oleomargarine.

R. M. Estes, *Deputy Commissioner.*

ba.
Incl.

16. Plaintiff further states that in the manufacture and sale of Southern Nut Product the net profit derived is approximately three cents per pound, and that unless immediate relief shall be granted by this honorable court, the levy and collection of ten cents per pound tax upon the said product heretofore and now being manufactured by plaintiff will render plaintiff insolvent, and in addition make it liable to severe criminal penalties and the forfeiture of its factory and plant in which said product is made, together with all raw materials and manufactured product on hand. That in addition thereto said demand will render hundreds of wholesalers and thousands of retailers who have been and are now handling and selling plaintiff's product liable to said special tax, additional penalties, and severe criminal liabilities.

17. Plaintiff further states that it is without adequate remedy at law, for the reason that a tax of ten cents per pound upon the amount of Southern Nut Product which plaintiff has heretofore manufactured and sold would amount to such an enormous sum that it would be impossible for plaintiff to pay the same to defendant and sue to recover, and that it is without any remedy save in a court of equity; that it is suffering immediate and irreparable injury and loss of property rights, and will continue to so suffer unless the relief prayed for herein shall be granted; that the said demands for taxes and special license fees which have already been made have completely demoralized the business of plaintiff throughout the territory in which said product has been marketed, and particularly the territory within the jurisdiction of this court; that the dealers and agents of plaintiff, fearing the severe taxes and penalties demanded by defendant and his agents carrying out his instructions, have ceased their purchases of plaintiff's product, have cancelled existing orders for same, have returned goods on hand, and have substituted other products therefor, and unless the relief prayed for herein shall be granted forthwith that the business of plaintiff will be entirely destroyed. Because of the great difference between the amount of tax per pound sought to be collected and the net amount of profit per pound on this product, plaintiff is not financially able to pay such tax and sue to recover, and if the proposed tax shall be imposed it will entirely destroy the business of plaintiff, which has been built up at great effort and expense, and with the knowledge and approval of the defendant. Furthermore, unless the relief prayed for herein be granted the valuable good will of plaintiff will be destroyed and its employees will be forced to see other employment.

18. Plaintiff further states that it sells its product to a great many wholesalers and retailers throughout the territory within the jurisdiction of this court, and that unless restrained by this honorable

court as prayed herein, defendant will subject plaintiff and its dealers to a multiplicity of suits.

19. Plaintiff further states that the attempt of defendant herein to make Southern Nut Product taxable as artificially colored oleomargarine will deprive plaintiff of its property without due process of law, as guaranteed by the Constitution of the United States, for the reason that the act of August 2, 1886 (sec. 14.), provides for a method of determining what substances submitted to the Commissioner of Internal Revenue for analysis shall be considered oleomargarine for the purpose of taxation. Said commissioner has heretofore so analyzed and inspected products similar to Southern Nut Product, and made final decision according to said law holding that said products are not taxable as artificially colored oleomargarine.

20. Plaintiff further states that section 14 of the act of August 2, 1886, is in part as follows:

11 "SEC. 14. That there shall be in the office of the Commissioner of Internal Revenue an analytical chemist and a microscopist, who shall each be appointed by the Secretary of the Treasury, and shall each receive a salary of two thousand five hundred dollars per annum; and the Commissioner of Internal Revenue may, whenever in his judgment the necessities of the service so require, employ chemists and microscopists, to be paid such compensation as he may deem proper, not exceeding in the aggregate any appropriation made for that purpose. And such commissioner is authorized to decide what substances, extracts, mixtures, or compounds which may be submitted for his inspection in contested cases are to be taxed under this act; and his decision in matters of taxation under this act shall be final. * * *"

21. Plaintiff further states that section 2 of the act of August 2, 1886, as passed by Congress, is as follows:

"SEC. 2 (act Aug. 2, 1886). That for the purposes of this act certain manufactured substances, certain extracts, and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known and designated as 'oleomargarine,' namely, all substances heretofore known as oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and neutral; all mixtures and compounds of oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and neutral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow beef fat, suet, lard, lard-oil, vegetable oil, annatto, and other coloring matter, intestinal fat, and offal fat made in imitation of semblance of butter, or when so made, calculated, or intended to be sold as butter, or for butter."

22. Plaintiff further states that Southern Nut Product is composed entirely of vegetable oils, salt, water, and harmless coloring matter, the same as the products Nut-Z-All and Nu-ine, there being no element of animal nature contained therein. That under the provisions of section 2 of the said act of August 2, 1886, as passed by Congress, only animal elements were included in the definition of oleomargarine; and that the act of defendant in attempting to make taxable

products composed entirely of vegetable ingredients is not justified or authorized by said act.

23. Plaintiff further states that said act of August 2, 1886, as amended, is unconstitutional and void in that it amounts to penalizing, under the guise of a tax, the manufacturers of oleomargarine in order that they may not compete with the manufacturers of butter, the so-called tax being a penalty and beyond the power of Congress to inflict.

24. Plaintiff further states that said act of August 2, 1886, as amended, on its face provides that any substance composed of certain-named ingredients shall be known as oleomargarine, if it is made in imitation or semblance of butter or if it is calculated or intended to be sold as or for butter, and if it contains artificial coloration which causes it to look like butter, it is subject to a penalty in the guise of a tax to the amount of ten cents, thus
12 eliminating all competition with butter rather than levying a tax, said object not being one of the powers granted to Congress by the Constitution of the United States.

25. Plaintiff further states that said act of August 2, 1886, as amended, is unconstitutional and void in that Congress has power to lay and collect taxes only to pay the debts of the United States, or, in other words, for revenue only, and that the object of said act was not to lay a tax to pay the debts of the United States, but was, as the history of the act shows, to regulate the manufacture and sale of oleomargarine, to prevent the fraudulent sale of oleomargarine as butter, and to prevent the competition of oleomargarine with butter, none of which objects is within the powers granted to Congress by the Constitution of the United States, said act attempting to bring about the said results under the pretext of levying and in the guise of a tax.

26. Plaintiff further states that said act of August 2, 1886, as amended, is unconstitutional and void in that it taxes oleomargarine, which is made to look like butter of any shade of yellow by artificial coloration, ten cents per pound, and taxes oleomargarine which is made to look like butter of any shade of yellow by any other means than artificial coloration, only one-fourth cent per pound, such classification being arbitrary and unreasonable and depriving plaintiff of its property without due process of law.

27. Plaintiff further states that said act of August 2, 1886, as amended, is unconstitutional and void in that it taxes oleomargarine containing artificial coloration ten cents per pound, and provides that butter containing artificial coloration may be manufactured and sold free from any tax whatsoever, such classification being arbitrary and unreasonable and depriving plaintiff of its property without due process of law.

28. Plaintiff further states that said act of August 2, 1886, as amended, is unconstitutional and void in that it is so vague and uncertain as not to inform plaintiff and manufacturers generally as to what combinations, substances, or mixtures constitute oleomar-

garine, said act being limited to certain named ingredients which were known as such ingredients prior to August 2, 1886.

29. Plaintiff further states that said act of August 2, 1886, as amended, is unconstitutional and void in that it attempts by a so-called tax to regulate an activity which is entirely within the jurisdiction of the States and subject only to the police power of the State, not being one of the powers granted to Congress by the Constitution of the United States but one which is reserved to the States and to the people thereof.

PRAYER

Wherefore plaintiff, being without remedy in the premises except in a court of equity, prays:

13 1. That writ of subpœna issue directed to the said defendant herein commanding him to appear and make full, true, and complete answer to this the plaintiff's petition, but not under oath, his said answer under oath being expressly waived, and to abide by and perform such orders or decrees as the court may make in the premises.

2. That the court order this cause to be heard on application for a preliminary injunction (hereby made) within ten days after the service hereof on said defendant, and that the court upon such application and hearing issue a preliminary injunction against the defendant, his agents, assistants, deputies, and employees, enjoining them, pending final hearing of this cause, from collecting, or attempting to collect, directly or indirectly, from the plaintiff, or any dealer selling plaintiff's product, Southern Nut Product, any pretended tax or imposition purporting to be levied or assessed against the plaintiff or said dealers under the oleomargarine act (act of August 2, 1886, chapter 840, 24 Stat. L. 209, as amended by act of May 9, 1902, chapter 784, sec. 332, Stat. L. 194), on account of the manufacture and sale of the said Southern Nut Product, referred to in the petition herein and manufactured by plaintiff; from seizing any of the property of plaintiff herein because an alleged tax of ten cents per pound on the said Southern Nut Product manufactured by plaintiff has not been paid; from distraining, seizing, entering upon, or attaching, or commencing any forfeiture proceedings against the property of plaintiff because an alleged tax of ten cents per pound has not been paid on the said Southern Nut Product manufactured by plaintiff; from enforcing any of the remedies provided for the collection of internal revenue of the United States against plaintiff, its property, officers, agents, or dealers, with respect to said Southern Nut Product; from notifying wholesale or retail dealers in said Southern Nut Product that because of the sale of the said product of plaintiff they will incur liability to a specific tax as dealers in artificially colored oleomargarine; and from making public announcement that the said product manufactured by plaintiff herein is liable to the tax imposed on artificially colored oleomargarine.

3. That upon final hearing of this cause the court order, adjudge, and decree that the defendant, his agents, assistants, deputies, and employees be perpetually enjoined from directly or indirectly collecting or attempting to collect from the plaintiff, or any dealers selling plaintiff's product Southern Nut Product, any pretended tax or imposition purporting to be levied or assessed against the plaintiff or said dealers under the oleomargarine act (act of August 2, 1886, chapter 840, 24 Stat. L. 209, as amended by act of May 9, 1902, chapter 784, sec. 332, Stat. L. 194) on account of the manufacture and sale of the said Southern Nut Product referred to in the petition herein and manufactured by plaintiff; from seizing any of the property of plaintiff herein because an alleged tax of ten cents per
14 pound on the said Southern Nut Product manufactured by plaintiff has not been paid; from distraining, seizing upon, entering upon, or attaching, or commencing any forfeiture proceedings against the property of plaintiff; because an alleged tax of 10¢ per pound has not been paid on the said Southern Nut Product manufactured by plaintiff; from enforcing any of the remedies provided for the collection of internal revenue of the United States against the plaintiff, its property, officers, agents, or dealers, with respect to said Southern Nut Product; and from notifying wholesale or retail dealers in said Southern Nut Product that because of the sale of the said product of plaintiff they will incur liability to a specific tax as dealers in artificially colored oleomargarine; and from making public announcement that the said product manufactured by plaintiff herein is liable to the tax imposed on artificially colored oleomargarine.

4. That plaintiff have such other, further, and general relief as the nature of the case may require, and the court may deem just and proper in the premises.

[SEAL.]

STANDARD NUT MARGARINE CO. OF FLORIDA,
By W. E. NICHOLSON, *Secy.-Treas.*

GEO. N. MURDOCK,
MILAM, MCILVAINE & MILAM,
By E. T. MCILVAINE,
Attorneys for Plaintiff.

[*Duly sworn to by W. E. Nicholson; jurat omitted in printing.*]

Affidavit.

File endorsement omitted.

[On carton:] One pound net, "Southern" Nut Product, Artificially Colored. This product is sold to you entirely on its merits as a nut product made from cocoanut oil, peanut oil, water,
15 and salt and it is not sold as a substitute for any other product. For cooking, baking, and seasoning. Keep in a cool dry place. Standard Nut Margarine Co. of Florida, Jacksonville, Fla.

(Filed Dec. 26, 1926, Jacksonville, Fla. Edwin R. Williams, clerk.)

On December 27th, A. D. 1929, a chancery subpœna was issued in this court directed to Peter H. Miller, individually and as collector of internal revenue for the district of Florida, and on January 2nd, 1930, said subpœna was returned executed by the U. S. marshal.

In United States District Court

[Title omitted.]

Answer

Filed Jan. 7, 1930

The defendant, Peter H. Miller, individually and as collector of internal revenue for the district of Florida, files this his answer to the bill of complaint herein, reserving unto himself the benefit of all necessary objections and exceptions to the errors and insufficiencies of said bill and the jurisdiction of the court, nevertheless answering so much and such parts of the bill as he is advised is material or necessary for him to answer, that is to say:

1. He admits the allegations of paragraph 1 of plaintiff's bill.
2. He admits the allegations of paragraph 2 of plaintiff's bill.
3. He admits the allegations of paragraph 3 of plaintiff's bill.
4. In answer to paragraph 4 of plaintiff's bill, he denies any knowledge or information sufficient to form a belief as to the averments therein contained and neither admits nor denies the same.
5. Answering paragraph 5 of the bill, defendant admits that plaintiff is engaged in the manufacture and sale of a nut product known as Southern Nut Product, manufactured and sold under its distinctive name; denies any knowledge or information sufficient to form a belief as to whether said name is in imitation of the distinctive name of any other product or not; he admits that the name is
16 accompanied on the label or brand with the name of the place where it is manufactured and produced; admits that said product contains no added poisonous or deleterious ingredients; admits that said product is a mixture or compound consisting of cocoanut oil, peanut oil, salt, and harmless coloring matter, but denies that the same is manufactured and sold for cooking, baking, and seasoning purposes, and affirmatively alleges that said product is manufactured, sold, and intended to be manufactured and sold in imitation or semblance of butter, and when so made, calculated, or intended to be sold as butter or for butter; defendant admits that said Southern Nut Product is packed in one-pound cartons similar to the sample attached to plaintiff's bill, but denies any knowledge or information sufficient to form a belief as to whether that is the only method or manner of packing said product; defendant denies any knowledge or information sufficient to form a belief as to whether plaintiff in the manufacture of said Southern Nut Product

buys the material so used in the said manufacture from a great many persons and firms located outside the State of Florida where the product is manufactured and sells and ships said product to a great number of firms and persons located in many States of the United States outside of the State of Florida, and, therefore, neither admits nor denies same.

6. Answering paragraph 6 of plaintiff's bill, defendant denies that plaintiff has been engaged in the manufacture of said Southern Nut Product for a period of two years, as alleged in said bill, and alleges that the plaintiff has not been engaged in such manufacture for a period of much over a year; defendant admits that plaintiff operates a plant and maintains offices in the city of Jacksonville and denies any knowledge or information sufficient to form a belief as to whether plaintiff had built up a reputation and standing for fair dealing with its customers and other people with whom it has done business.

7. Answering paragraph 7 of plaintiff's bill, defendant admits that prior to time plaintiff engaged in the manufacture and sale of said Southern Nut Product an action at law had been brought against one Page, collector of internal revenue of the United States for the district of Rhode Island for the purpose of recovering from said collector taxes paid under protest by the Higgins Manufacturing Company on a product manufactured and sold by that company known as Nut-Z-All, but defendant denies that said Nut-Z-All was manufactured in the same way and with the same ingredients as Southern Nut Product is manufactured by the plaintiff herein, and defendant affirmatively alleges that said Southern Nut Product is manufactured in a different manner from that used in the manufacture of Nut-Z-All and that the same is sold in a different manner from Nut-Z-All and is not the same product as Nut-Z-All; defendant admits that after hearing the evidence submitted on behalf of both plaintiff and defendant in said Higgins Manu-
17 facturing Company case the court held that said Nut-Z-All was not made in imitation or semblance of butter, nor when so made, calculated, or intended to be sold as butter or for butter and that under the law the court held it was not oleomargarine and not taxable as oleomargarine; defendant admits that the decision in said case is found in volume 297 of Federal Reporter at page 644.

8. Answering paragraph 8 of plaintiff's bill, defendant admits that Treasury Decision 3590 was promulgated and published, but as to whether or not all concerned were informed that Nut-Z-All had been held by the court as not to be oleomargarine defendant denies any knowledge or information and neither admits nor denies the same.

9. Answering paragraph 9 of plaintiff's bill, defendant admits that in June, 1924, an organization or association of oleomargarine manufacturers, known as the Institute of Margarine Manufacturers, maintained headquarters in Washington, D. C., and that inquiry

was made by said institute to David H. Blair, then Commissioner of Internal Revenue, as to the taxability of said product, Nut-Z-All; defendant admits that a letter set forth in paragraph 9, signed by R. M. Estes, deputy commissioner, was addressed to the Institute of Margarine Manufacturers, dated August 20, 1924.

10. Answering paragraph 10 of plaintiff's bill, defendant admits that Treasury Decision 4006 was promulgated and published, but alleges that said Treasury Decision 4006 was revoked according to law and that the same had been revoked for some considerable period of time before the filing of this action and is no longer in force and effect.

11. Answering paragraph 11 of plaintiff's bill, defendant admits that in July of 1927 the Higgins Manufacturing Company, of Rhode Island, filed in the United States District Court for Rhode Island a petition for temporary injunction against one Page, collector of internal revenue for the district of Rhode Island, praying for a restraining order against the collector of internal revenue from collecting the tax on Nut-Z-All as oleomargarine; defendant admits that the temporary restraining order was issued in words and figures as set forth in said paragraph 11 of plaintiff's bill, and that Judge Lowell rendered an opinion in said cause as set forth in said paragraph 11.

12. Answering paragraph 12 of plaintiff's bill, the defendant admits that in July, 1927, the Baltimore Butterine Company filed a petition in the Supreme Court of the District of Columbia for a temporary and permanent injunction against Commissioner of Internal Revenue Blair and Deputy Commissioner of Internal Revenue Estes to restrain them from enforcing Treasury Decision 4006 against the products manufactured by said company known as Nu-ine; defendant denies that said Southern Nut Product is identical in content and appearance with said nut product Nu-ine, and further denies that said Southern Nut Product is identical in contents and appearance with Nut-Z-All, and defendant affirmatively alleges
18 that said product known as Southern Nut Product is a different product from Nu-ine and Nut-Z-All, and that said product known as Southern Nut Product is manufactured, sold, and marketed in a different method and manner from the manner and methods employed in the manufacture and sale of Nu-ine and Nut-Z-All; defendant admits that an injunction pendente lite was issued as set forth in paragraph 12 of said bill and that thereafter Justice Hoehling made said injunction permanent and that said injunction is in words and figures as set forth in paragraph 12 of plaintiff's bill.

13. Answering paragraph 13 of plaintiff's bill, defendant denies any knowledge or information sufficient to form a belief as to whether or not plaintiff relies upon said first decision in the Higgins case or Treasury Decision 3590, or the letter signed by R. M. Estes, or said injunction, before commencing to manufacture said product, or whether it began or continued to so manufacture as a result thereof and can therefore neither admit or deny the same; defendant affirma-

tively alleges that the plaintiff never submitted its product to the Commissioner of Internal Revenue as required by law, nor to defendant herein to ascertain whether or not this particular product, Southern Nut Product, manufactured by the plaintiff was subject to a tax or as to whether the Commissioner of Internal Revenue had determined the same to be oleomargarine and taxable as such.

14. Answering paragraph 14 of plaintiff's bill, defendant admits that a decision was rendered by Hon. William H. Barrett in the District Court for the Southern District of Georgia, but denies that said case involves the question as to whether said Southern Nut Product was taxable or nontaxable, and the defendant affirmatively alleges that the litigation there involved was not predicated under the act of Congress of August 2, 1886 (24 Stat. 209), as amended by the act of May 9, 1902 (32 Stat. 193), known as the oleomargarine law, nor was a construction of that law involved in said litigation, or the decision rendered therein, as set forth in paragraph 14 of plaintiff's bill.

15. Answering paragraph 15 of plaintiff's bill, defendant admits that he received a letter from R. M. Estes, Deputy Commissioner of Internal Revenue, as set forth and contained in said paragraph 15, but denies that he has threatened to collect the tax of ten cents per pound upon said Southern Nut Product.

16. Answering paragraph 16 of plaintiff's bill, the defendant denies any knowledge or information sufficient to form a belief as to whether the manufacture and sale of said product is approximately three cents per pound, and therefore neither admits or denies the same. He denies that unless plaintiff's petition be granted by this court the levy and collection of ten cents per pound tax upon the nut product already manufactured by plaintiff will render the plaintiff insolvent or subject it to severe penalties or the forfeiture of its factories or plants in which said products are made; defendant admits that said demand will render hundreds of wholesalers and retailers who are now handling and selling said products liable for taxes, but denies that it will subject them to severe criminal liability..

19 17. Answering paragraph 17 of plaintiff's bill, defendant denies that plaintiff has no adequate remedy at law and is without any remedy save in the court of equity, or that it is suffering immediate and irreparable loss of property rights, or will continue to so suffer unless the prayer here petitioned for be granted; defendant denies that the demands for taxes and special license fees have completely demoralized the business of plaintiff throughout the territory in which said products have been manufactured, and particularly the territory within the jurisdiction of this court; denies that dealers and agents of plaintiff, fearing severe taxes and penalties, have ceased their purchases of plaintiff's product and have canceled existing orders for same and that they have returned goods on hand and have substituted other products therefor, and defendant affirmatively alleges that if plaintiff's business has become demoralized throughout the territory and within the jurisdiction of this court and that

the dealers and agents of plaintiff fear severe taxes and penalties and have canceled orders and returned goods on hand and substituted other products therefor, it is by reason of the fact that the United States District Court for the Western Division of the Western District of Missouri in the case of Harrow-Taylor Butter Company, plaintiff, v. Noah Crooks, Collector of Internal Revenue for the Sixth District of Missouri, defendant, same being Cause No. 7569, held that a product manufactured and sold in practically the same manner and by virtue of the same means and processes as used by plaintiff to be oleomarg'ine and within the purview of the act of Congress of August 2, 1886 (24 Stat. 209), as amended by the act of May 9, 1902 (32 Stat. 193), known as the oleomarg'ine law; that by reason of said decision having been rendered as herein alleged by said court the entire trade engaged in the manufacture of vegetable oil products were advised of the decision holding said Rich-Nut shortening taxable at the rate of ten cents per pound; that as a result thereof all the manufacturers of said products in the United States ceased manufacturing said products and refrain from any further attempting to handle or sell any of said products and all persons handling said products were advised of said decision and were advised by counsel representing to stop the manufacture and sale; defendant denies any knowledge or information sufficient to form a belief, therefore can neither admit or deny, that because of the great difference in tax per pound sought to be collected and the net amount of profit per pound of said product plaintiff is not financially able to pay such tax and sue to recover; denies that if said tax is imposed it would destroy the business of plaintiff; denies that unless the relief prayed for in said bill be granted the good will of plaintiff will be destroyed and its employees forced to seek other employment.

18. Answering paragraph 18 of plaintiff's bill, defendant admits that plaintiff prior to the Harrow-Taylor decision did sell its products in many different collection districts of the United States, but as to whether it still so continues defendant denies any knowledge sufficient to form a belief; denies that unless restrained by this court plaintiff and its dealers will be subjected to a multiplicity of suits and various court proceedings.

19. Answering paragraph 19 of plaintiff's bill, defendant denies that an attempt to make said nut products taxable as artificially colored oleomargarine would deprive plaintiff of its property without due process of law as guaranteed by the Constitution of the United States; defendant admits that the act of August 2, 1886, provides a method of determining what substances submitted to the Commissioner of Internal Revenue for analysis shall be considered oleomargarine; defendant denies that said Commissioner of Internal Revenue has heretofore analyzed and inspected plaintiff's products on which taxes have been asserted and made final decisions according to law that said products were not taxable as artificially colored oleomargarine, and the defendant alleges that none of the products upon which a tax has now been asserted and payment of which is

now due has ever been determined by said defendant to be non-taxable.

20. Defendant admits paragraph 20 of plaintiff's bill.

21. Defendant admits paragraph 21 of plaintiff's bill.

22. Answering paragraph 22 of plaintiff's bill, defendant admits that plaintiff's products are composed of vegetable oils, salt, water, and harmless coloring matter, and admits that there is no element of animal nature contained therein, but denies that said products are the same as Nut-Z-All and Nu-ine and affirmatively alleges that said products are the same as Rich-Nut, which said product was held by the United States District Court in the case of Harrow-Taylor Butter Company v. Crooks taxable as oleomargarine; defendant denies that under the provisions of section 2 of the act of Congress of August 2, 1886, as passed by Congress, only animal elements were included in the definition of oleomargarine; defendant further denies that there is no justification or authorization by said act making said products composed entirely of vegetable ingredients taxable as oleomargarine, and the defendant affirmatively alleges that said act of August 2, 1886, as amended, includes in said definition defining oleomargarine such ingredients as are set forth and described in plaintiff's bill and used by plaintiff in manufacturing Southern Nut Product.

23. Answering paragraph 23, defendant denies that said act of August 2, 1886, as amended, is unconstitutional and void in that it amounts to penalizing under the guise of a tax the manufacturers of oleomargarine in order that they may not compete with the manufacturers of butter, and denies the so-called tax is a penalty and being beyond the power of Congress to impose, and the defendant affirmatively alleges that said act is constitutional and that the same is a revenue act and has so been held by the Supreme Court of the United States.

24. Answering paragraph 24 of plaintiff's bill, the defendant alleges that the averments in said paragraph are conclusions of the pleader and call for no answer from this defendant.

21 25. Answering paragraph 25 of plaintiff's bill, defendant denies that said act is unconstitutional and void, and alleges that the balance of the averments of said paragraph are conclusions of the pleader and do not require an answer.

26. Answering paragraph 26 of plaintiff's bill, the defendant denies that said act of August 2, 1886, as amended, is unconstitutional, and denies that plaintiff is deprived of its property without due process of law; as to the balance of the averments contained in said paragraph, defendant alleges that they are conclusions of the pleader and do not require an answer.

27. Answering paragraph 27, defendant denies the allegations therein contained.

28. Defendant denies the allegations set forth and contained in paragraph 28 of plaintiff's bill.

29. Answering paragraph 29, defendant denies the allegations therein contained.

The defendant further answering plaintiff's bill of complaint affirmatively alleges that the product set forth and described in plaintiff's bill, known as Southern Nut Product, upon which the taxes have been asserted, which are now due and owing by the plaintiff to the United States, are products manufactured by the plaintiff and placed on the market for and in imitation of butter and are sold in imitation of butter and in semblance of butter; that said products are purchased in the public market as imitation of butter and that said products so purchased are used by the public as imitation of butter; that said products are placed in the market in packages of the same size and character as butter, all of which is within the knowledge of the plaintiff; that the said products are not cooking compounds generally known and used by the trade as cooking compounds, and that said products are not sold to a cooking-compound trade, but that all of said products are sold to the butter trade and are handled by the trade the same as butter, and if said products are sold as cooking compounds they are sold and used as such the same as butter is used for a cooking compound; that said products are flavored similar to butter, thereby making said products so similar to butter in taste that none except experts can detect these imitations from real butter; that the method of adding artificial coloring to said products has been so perfected that it is impossible to detect these products from various grade of butter; that said products have a very similar texture to butter; and the defendant alleges that said products are products which are marketed, manufactured, and sold, and are intended to be marketed, manufactured, and sold, in imitation of and in semblance of butter, and that said products are marketed, manufactured, and sold in imitation of and in semblance of butter, all of which is well known by the plaintiff and so intended by the plaintiff and that same come within the provisions of the act of Con-
22 gress of August 2, 1886, as amended, and are, therefore, taxable; that said products so marketed and manufactured and upon which taxes have now been asserted and are now due and owing have been before the courts for adjudication; and action was instituted by this plaintiff and others in the Supreme Court of the District of Columbia against David H. Blair, Commissioner of Internal Revenue, same being Equity No. 49751, wherein this plaintiff upon the same facts and the same showing which is now being made to this court made application to the Hon. Justice Bailey, of the Supreme Court of the District of Columbia, for a temporary restraining order to restrain the commissioner from determining said products taxable and to enjoin the collection of the tax thereon and that upon an ex-party application a temporary restraining order was granted and a rule to show cause therein issued, whereupon the matter came before said court for hearing, and after a full presentation of the issues for both the plaintiffs and the defendants and the court being fully apprized in the premises vacated the temporary restraining order and denied plaintiff's motion for injunction pendente lite, all of which is res adjudicata as to the issues now before this court. Defendant further affirmatively alleges that the Har-

row-Taylor Butter Company, of Kansas City, likewise filed an action in the Supreme Court of the District of Columbia, same being entitled the Harrow-Taylor Butter Company v. Commissioner of Internal Revenue Blair, wherein proceedings were instituted for the purpose of enjoining the collection of said tax; that a temporary restraining order was granted and a rule to show cause issued; the matter was fully presented to the court by both sides, and thereafter the court vacated the temporary restraining order and denied an injunction pendente lite. The defendant further avers that subsequently a tax was asserted and collected against the said Harrow-Taylor Butter Company, of Kansas City, on its product, which is identical with the product manufactured by the plaintiff herein, and that the said Harrow-Taylor Butter Company filed a suit in the United States District Court of the Western Division of the Western District of Missouri against Noah Crooks, collector of the sixth collection district of the State of Missouri, said cause being No. 7569, for the recovery of said tax so collected; said cause was tried upon the merits, and after a full presentation the court found that said Rich-Nut shortening manufactured by the said Harrow-Taylor Butter Company, which said product the defendant alleges to be for the purposes of taxation the same as the product now being manufactured by the plaintiff to be taxable under the act of August 2, 1886, as amended, and rendered judgment in favor of the defendant.

Defendant further alleges that said taxes having been duly assessed according to law and coming within the provisions of the act of August 2, 1886, as amended, and that said products having been determined by the Commissioner of Internal Revenue to be taxable

23 the defendant is advised by counsel and therefore alleges that this court of equity is without jurisdiction to restrain the collection of said Federal taxes duly assessed pursuant to and in accordance with said act as hereinbefore set forth for the reasons (a) of the prohibition of section 3224 of the Revised Statutes of the United States, and (b) that the plaintiff has an adequate and complete remedy at law.

Wherefore, having fully answered the bill of complaint of the plaintiff, the defendant prays that the motion heretofore made praying for an injunction be denied and that plaintiff's bill of complaint be dismissed.

(Sgd.) PETER H. MILLER,
Collector of Internal Revenue.

(Sgd.) W. P. HUGHES,
United States Attorney.

H. F. MCCONNELL,
Special Attorney,
Bureau of Internal Revenue, Washington, D. C.

[*Duly sworn to by Peter H. Miller; jurat omitted in printing.*]

[File endorsement omitted.]

In United States District Court

[Title omitted.]

Preliminary injunction

Filed Jan. 7, 1930

This cause having heretofore been set for hearing this day, came on to be heard upon the application of plaintiff for a pre-
24 liminary injunction, and was argued by counsel, and the court being fully advised in the premises, and it appearing that the plaintiffs will suffer irreparable injury unless relief be afforded pending final disposition of this cause, it is hereby ordered, adjudged, and decreed as follows, viz:

That the defendant, his agents, assistants, deputies, and employees be enjoined, pending final hearing of this cause, from collecting or attempting to collect, directly or indirectly, from the plaintiff, or any dealer selling plaintiff's product Southern Nut Product, any pretended tax or imposition purporting to be levied or assessed against the plaintiff or said dealers under the oleomargarine act (act of August 2, 1886, chapter 840, 24 Stat. 209, as amended by act of May 9, 1902, chapter 784, sec. 332, Stat. L. 194) on account of the manufacture and sale of the said Southern Nut Product referred to in the petition herein and manufactured by plaintiff; from seizing any of the property of plaintiff herein because an alleged tax of ten cents per pound on the said Southern Nut Product manufactured by plaintiff has not been paid; from distraining, seizing, entering upon, or attaching, or commencing any forfeiture proceedings against the property of plaintiff because an alleged tax of ten cents per pound has not been paid on the said Southern Nut Product manufactured by plaintiff; from enforcing any of the remedies provided for the collection of internal revenue of the United States against plaintiff, its property, officers, agents, or dealers, with respect to said Southern Nut Product; from notifying wholesale or retail dealers in said Southern Nut Product that because of the sale of the said product of plaintiff they will incur liability to a specific tax as dealers in artificially colored oleomargarine; and from making public announcement that the said product manufactured by plaintiff herein is liable to the tax imposed on artificially colored oleomargarine. Provided, this injunction shall not be effective until a good and sufficient Surety Company bond shall be filed herein and approved by the clerk in the penal sum of ten thousand ($10,000) dollars, conditioned to pay all costs and damages occasioned by the wrongful issuance of this injunction, in case said injunction be hereafter dissolved.

Done and ordered at chambers in Jacksonville, Florida, this January 7th, 1930.

LAKE JONES, *Judge.*

[File endorsement omitted.]

In United States District Court

[Title omitted.]

25 *Injunction bond*

Filed Jan. 7, 1930

Know all men by these presents, that we, the Standard Nut Margarine Company, of Florida, a corporation organized and existing under the laws of the State of Florida, as principal, and Hartford Accident & Indemnity Company, of Hartford, Conn., a surety company authorized to do a general surety business in the State of Florida, as surety, are held and firmly bound, jointly and severally, to Peter H. Miller, individually and as collector of internal revenue of the district of Florida, in the penal sum of ten thousand dollars ($10,000.00), for the payment whereof, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Signed and sealed at Jacksonville, Florida, this 7th day of January, A. D. 1930.

The condition of this obligation is such that whereas the United States District Court for the Southern District of Florida in the above-entitled cause granted an injunction on the 7th day of January, A. D. 1930, enjoining the said Peter H. Miller, defendant, as collector of internal revenue of the district of Florida, pending final hearing of said cause from collecting or attempting to collect certain taxes levied and assessed against said the Standard Nut Margarine Company, of Florida, a corporation.

Now, therefore, this indenture further witnesseth that if the above bounden, the Standard Nut Margarine Company, of Florida, a corporation, shall well and truly pay to the said Peter H. Miller, individually and as collector of Internal Revenue for the district of Florida, all costs and damages occasioned by the wrongful issuance of said injunction in case said injunction be hereafter dissolved, then this obligation to be void, else to be and remain in full force and effect.

THE STANDARD NUT MARGARINE COMPANY
OF FLORIDA, A CORPORATION,
By W. T. MELLOTT, *Its President.* [SEAL.]

Attest:

W. E. NICHOLSON, *Its Secretary, Principal.*
HARTFORD ACCIDENT & INDEMNITY COMPANY,
By BURDETTE GARRISON, [SEAL.]
Its Attorney-in-Fact, Surety.

Taken and approved before me this 7th day of January, A. D. 1930.

[SEAL.] CLERK UNITED STATES DISTRICT COURT,
EDWIN R. WILLIAMS, *Clerk.*

[File endorsement omitted.]

26 In United States District Court

[Title omitted.]

Motion for leave to file amended answer

Filed Feb. 17, 1930

Comes now the defendant, Peter H. Miller, individually and as collector of internal revenue for the district of Florida, by his undersigned attorneys, and moves the court for leave to file an amended answer herein, a copy of which proposed amended answer is attached hereto.

W. P. HUGHES,
United States Attorney.
H. F. MCCONNELL,
Special Attorney, Bureau of Internal Revenue, Washington, D. C.
R. F. BROWN,
Special Attorney, Bureau of Internal Revenue, Miami, Florida.

[File endorsement omitted.]

In United States District Court

[Title omitted.]

Stipulation re amended answer

Filed Feb. 18, 1930

It is hereby stipulated and agreed by and between the attorneys for the respective parties to the above-entitled cause that the defendant, Peter H. Miller, individually and as collector of internal revenue for the district of Florida, may file an amended answer in said cause, and it is further stipulated and agreed that said defend-
27 ant may present his motion for leave of court to file said amended answer without further notice, and that an order on the same may be entered immediately.

Dated this 14th day of February, A. D. 1930.

MILAM, MCILVAINE & MILAM,
By E. T. MCILVAINE,
GEORGE N. MURDOCK,
Attorneys for Plaintiff.
W. P. HUGHES,
United States Attorney.
H. F. MCCONNELL,
Special Atty., Bureau of Internal Revenue, Washington, D. C.
R. F. BROWN,
Special Atty., Bureau of Internal Revenue, Miami, Florida.

[File endorsement omitted.]

In United States District Court

[Title omitted.]

Order allowing filing of amended answer

Filed Feb. 18, 1930

This cause coming on this day to be heard upon the motion of the defendant, Peter H. Miller, individually and as collector of internal revenue for the district of Florida, for leave to file an amended answer, and the stipulation of attorneys for the plaintiff and attorneys for the defendant agreeing that an amended answer may be filed in said cause and further agreeing that said defendant may present his motion for leave of court to file said amended answer without further notice, and that an order on the same may be entered immediately, and the court being fully advised in the premises.

It is therefore ordered, adjudged, and decreed that said motion of the defendant herein for leave of court to file an amended answer in said cause be and it is hereby granted.

Done and ordered in chambers at Jacksonville, Florida, this 18th day of February, A. D. 1930.

LAKE JONES,
United States District Judge.

[File endorsement omitted.]

28 In United States District Court

[Title omitted.]

Amended answer

Filed Feb. 18, 1930

The defendant, Peter H. Miller, individually and as collector of internal revenue for the district of Florida, leave of court first having been had, files this, his amended answer to the bill of complaint herein, reserving unto himself the benefit of all necessary objections and exceptions to the errors and insufficiencies of said bill and the jurisdiction of the court, nevertheless answering so much and such parts of the bill as he is advised it is material or necessary for him to answer, that is to say:

1. He admits the allegations of paragraph 1 of plaintiff's bill.
2. He admits the allegations of paragraph 2 of plaintiff's bill.
3. He admits the allegations of paragraph 3 of plaintiff's bill.
4. In answer to paragraph 4 of plaintiff's bill, he denies any knowledge or information sufficient to form a belief as to the averments therein contained and neither admits nor denies the same.
5. Answering paragraph 5 of the bill, defendant admits that plaintiff is engaged in the manufacture and sale of a nut product known

as Southern Nut Product, manufactured and sold under its distinctive name; denies any knowledge or information sufficient to form a belief as to whether said name is in imitation of the distinctive name of any other product or not. He admits that the name is accompanied on the label or brand with the name of the place where it is manufactured and produced; admits that said product contains no added poisonous or deleterious ingredients; admits that said product is a mixture or compound consisting of cocoanut oil, peanut oil, salt, and harmless coloring matter, but denies that the same is manufactured and sold for cooking, baking, and seasoning purposes, and affirmatively alleges that said product is manufactured, sold, and intended to be manufactured and sold in imitation or semblance of butter, and when so made, calculated, and/or intended to be sold as butter or for butter; defendant admits that said Southern Nut Product is packed in one-pound cartons similar to the sample attached to plaintiff's bill, but denies any knowledge or information sufficient to form a belief as to whether that is the only method or manner of packing said product; defendant denies any knowledge or information sufficient to form a belief as to whether plaintiff in the manufacture of said Southern Nut Product buys the materials so used in the said manufacture from a great many persons and firms located
29 outside the State of Florida where the product is manufactured, and sells and ships said product to a great number of firms and persons located in many States of the United States outside of the State of Florida, and, therefore, neither admits nor denies same.

6. Answering paragraph 6 of plaintiff's bill, defendant denies that plaintiff has been engaged in the manufacture of said Southern Nut Product for a period of two years as alleged in said bill, and alleges that the plaintiff has not been engaged in such manufacture for a period of much over a year; defendant admits that plaintiff operates a plant and maintains offices in the city of Jacksonville; denies any knowledge or information sufficient to form a belief as to whether plaintiff had built up a reputation and standing for fair dealing with its customers and other people with whom it has done business.

7. Answering paragraph 7 of plaintiff's bill, defendant admits that prior to engaging in the manufacture and sale of said Southern Nut Product an action at law was brought against one Page, collector of internal revenue for the district of Rhode Island, for the recovery of taxes paid by the Higgins Manufacturing Company on a product known as Nut-Z-All, but as to whether said product was manufactured in the same way and of the same ingredients as Southern Nut Product is manufactured, defendant denies any knowledge or information sufficient to admit or deny the same and therefore neither admits nor denies the same. The defendant admits that the decision in said case is found in volume 297, Federal Reporter, page 644.

8. Answering paragraph 8 of plaintiff's bill, defendant admits that Treasury Decision 3590 was promulgated and published, but as to whether or not all concerned were informed that Nut-Z-All

had been held by the court as not to be oleomargarine, defendant denies any knowledge or information and neither admits nor denies the same.

9. Answering paragraph 9 of plaintiff's bill, defendant admits that in June, 1924, an organization or association of oleomargarine manufacturers known as the Institute of Margarine Manufacturers maintained headquarters in Washington, D. C., and that inquiry was made by said institute to David H. Blair, then Commissioner of Internal Revenue, as to the taxability of said product, Nut-Z-All; defendant admits that a letter set forth in paragraph 9, signed by R. M. Estes, deputy commissioner, was addressed to the Institute of Margarine Manufacturers, dated August 20, 1924.

10. Answering paragraph 10 of plaintiff's bill, defendant admits that Treasury Decision 4006 was promulgated and published, but alleges that said Treasury Decision 4006 was revoked according to law and that the same had been revoked for some considerable period of time before the filing of this action and is no longer in force and effect.

11. He admits the allegations of paragraph 11 of plaintiff's bill.

12. In answer to paragraph 12 of plaintiff's bill, defendant's admits that the Baltimore Butterine Company filed a petition as set forth in said paragraph, but denies any knowledge or information sufficient to form a belief as to whether or not said Southern Nut Product is identical in content and appearance with said products Nu-ine and Nut-Z-All, and therefore neither admits nor denies said allegation.

13. Answering paragraph 13 of plaintiff's bill, defendant denies any knowledge or information sufficient to form a belief as to whether or not plaintiff relies upon said first decision in the Higgins case or Treasury Decision 3590, or the letter signed by R. M. Estes, or said injunction, before commencing to manufacture said product, or whether it began or continued to so manufacture as a result thereof, and can therefore neither admit or deny the same; defendant affirmatively alleges that the plaintiff never submitted its product to the Commissioner of Internal Revenue as required by law, nor to defendant herein to ascertain whether or not this particular product, Southern Nut Product, manufactured by the plaintiff was subject to a tax or as to whether the Commissioner of Internal Revenue had determined the same to be oleomargarine and taxable as such.

14. Answering paragraph 14 of plaintiff's bill, defendant admits that a decision was rendered by Hon. William H. Barrett in the District Court for the Southern District of Georgia, but denies that said case involved the question as to whether said Southern Nut Product was taxable or nontaxable, and the defendant affirmatively alleges that the litigation there involved was not predicated under the act of Congress of August 2, 1886 (24 Stat. 209), as amended by the act of May 9, 1902 (32 Stat. 193), known as the oleomargarine law, nor was a construction of that law involved in said litigation

or the decision rendered therein as set forth in paragraph 14 of plaintiff's bill.

15. Answering paragraph 15 of plaintiff's bill, defendant admits that he received a letter from R. M. Estes, Deputy Commissioner of Internal Revenue, as set forth and contained in said paragraph 15, and denies that he has made any threats to collect a tax of ten cents per pound on said Southern Nut Product, but affirmatively alleges that the plaintiff has at all times herein mentioned and is now voluntarily paying the tax of ten cents per pound upon said product pursuant to and in accordance with the provisions of the Act of August 2, 1886, as amended, as required of all manufacturers of oleomargarine.

16. Answering paragraph 16 of plaintiff's bill, the defendant denies any knowledge or information sufficient to form a belief as to whether the net profit derived in the manufacture and sale of said product is approximately three cents per pound and therefore neither admits or denies the same. He denies that unless plaintiff's petition be granted by this court the levy and collection of ten cents per pound tax upon the nut product already manufactured by plaintiff will render the plaintiff insolvent or subject it to severe penalties or the forfeiture of its factories or plants in which said prod-
31 ucts are made; defendant admits that said demand will render hundreds of wholesalers and retailers who are now handling and selling said products liable for taxes, but denies that it will subject them to severe criminal liability.

17. Answering paragraph 17 of plaintiff's bill, defendant denies that plaintiff has no adequate remedy at law and is without any remedy save in the court of equity or that it is suffering immediate and irreparable loss of property rights, or will continue to so suffer unless the prayer here petitioned for be granted; defendant denies that the demands for taxes and special license fees have completely demoralized the business of plaintiff throughout the territory in which said products have been manufactured, and particularly the territory within the jurisdiction of this court; denies that dealers and agents of plaintiff, fearing severe taxes and penalties, have ceased their purchases of plaintiff's product and have canceled existing orders for same and that they have returned goods on hand and have substituted other products therefor; defendant denies that because of the difference in tax per pound sought to be collected and the net amount of profit upon said product plaintiff is not financially able to pay the tax and sue to recover, and affirmatively alleges that the plaintiff is now and at all times herein mentioned has been paying the tax of ten cents per pound on said product it manufactures and sells, and denies that the imposing of said tax is destroying or will destroy the business of plaintiff; and further denies that unless the relief prayed for herein be granted the good will of plaintiff will be destroyed and its employees forced to seek other employment.

18. Answering paragraph 18 of plaintiff's bill, defendant admits that the plaintiff sells its product to a great many retailers and wholesalers throughout the territory and within the jurisdiction of this court, and denies that unless restrained by this court defendant will subject plaintiff and its dealers to a multiplicity of suits.

19. Answering paragraph 19 of plaintiff's bill, defendant denies that any attempt to make Southern Nut Product taxable as artificially colored oleomargarine will deprive plaintiff of its property without due process of law; defendant denies that the commissioner has made final decision that said Southern Nut Product or similar products are not taxable as artificially colored oleomargarine.

20. Defendant admits paragraph 20 of plaintiff's bill.

21. Defendant admits paragraph 21 of plaintiff's bill.

22. Answering paragraph 22 of plaintiff's bill, defendant admits that plaintiff's products are composed of vegetable oil, salt, water, and harmless coloring matter, and that there is no element of an animal nature therein contained, but as to whether or not said products are the same as Nut-Z-All and Nu-ine, the defendant denies any knowledge or information sufficient to form a belief, and, therefore, can neither admit nor deny the same; and as to the re-
32 maining allegations as set forth in said paragraph, the defendant alleges the same are the conclusions of the pleader and call for no answer.

23. Answering paragraph 23 of plaintiff's bill, defendant denies the same.

24. Answering paragraph 24 of plaintiff's bill, defendant denies the same.

25. Answering paragraph 25 of plaintiff's bill, defendant denies the same.

26. Answering paragraph 26 of plaintiff's bill, defendant denies the same.

27. Answering paragraph 27 of plaintiff's bill, defendant denies the same.

28. Answering paragraph 28 of plaintiff's bill, defendant denies the same.

29. Answering paragraph 29 of plaintiff's bill, defendant denies the same.

The defendant, further answering plaintiff's bill of complaint, affirmatively alleges that said taxes, having been duly assessed and sold by plaintiff, is artificially colored oleomargarine, and is taxable pursuant to and in accordance with the provisions of the act of August 2, 1886, as amended.

Further answering plaintiff's bill of complaint, the defendant affirmatively alleges that said taxes, having been duly assessed against said products according to law, and said products being oleomargarine within the provisions of the act of August 2, 1886, as amended, and said products having been determined by the Commissioner of Internal Revenue to be taxable as oleomargarine, the de-

fendant is advised by counsel and therefore alleges that this court of equity is without jurisdiction to restrain the collection of said taxes duly assessed pursuant to and in accordance with said act, as hereinbefore set forth for the reason—

(a) Of the prohibition of section 3224 of the Revised Statutes of the United States; and

(b) That the plaintiff has an adequate and complete remedy at law.

Wherefore, having fully answered the bill of complaint, the defendant prays that the motion heretofore made praying for an injunction be denied and that plaintiff's bill of complaint be dismissed.

PETER H. MILLER,
Collector of Internal Revenue.

W. P. HUGHES,
United States Attorney.
H. F. MCCONNELL,
Special Attorney, Bureau of Internal Revenue,
Washington, D. C.
R. F. BROWN,
Special Attorney, Bureau of Internal Revenue,
Miami, Florida.

33 [*Duly sworn to by Peter H. Miller; jurat omitted in printing.*]

[File endorsement omitted.]

In United States District Court for the Southern District of Florida, Jacksonville Division

In Equity, No. 651

THE STANDARD NUT MARGARINE COMPANY OF FLORIDA, A CORPORATION, plaintiff

vs.

PETER H. MILLER, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE for the District of Florida, defendant

Final decree

Filed Mar. 4, 1930

This cause having come on for final hearing, and court having heard the evidence, and being fully advised of its judgment in the premises; it is ordered, adjudged, and decreed as follows:

1. The equities of this cause are with the complainant and against the defendant, and complainant is entitled to the relief prayed in the bill of complaint.

2. The court finds that the complainant has established the material allegations of the bill of complaint.

3. It is ordered that the temporary injunction granted in this cause under date January 7th, A. D. 1930, be, and the same is hereby, made permanent, and that said defendant, Peter H. Miller, as collector of internal revenue for the district of Florida, be, and he is hereby, permanently restrained and enjoined as in said temporary injunction said defendant was heretofore enjoined.

34 Done and ordered at chambers at Jacksonville, Florida, this March 4th, A. D. 1930.

LAKE JONES, *District Judge.*

[File endorsement omitted.]

In United States District Court

[Title omitted.]

Notice of appeal

To the Standard Nut Margarine Company of Florida, a Corporation, Jacksonville, Florida, Greeting:

You are hereby notified that Peter H. Miller, individually and as collector of internal revenue for the district of Florida, the defendant in the above-enti'led cause, appellant herein, hereby appeals to the United States Circuit Court of Appeals for the Fifth Circuit from that certain final decree entered in the above-styled cause on the 4th day of March, A. D. 1930, and from each and every part thereof.

And you are further hereby notified that said defendant, appellant herein, has filed his assignment of errors in said cause in accordance with law, staying further proceedings in said cause pending the final judgment on appeal in said cause.

(Filed April 15, 1930, Jacksonville. Edwin R. Williams, clerk.)

W. P. HUGHES,
United States Attorney,
H. F. MCCONNELL,
Special Attorney, Bureau of Internal Revenue, Washington, D. C.,
RAYMOND F. BROWN,
Special Attorney, Bureau of Internal Revenue, Miami, Florida,
Attorneys for Peter H. Miller, Individually and as Collector of Internal Revenue for the District of Florida, Defendant and Plaintiff in Error.

35 In United States District Court

[Title omitted.]

Petition for appeal

Filed April 15, 1930

To the honorable Judges of the United States District Court for the Southern District of Florida:

Comes now Peter H. Miller, individually and as collector of internal revenue for the district of Florida, defendant herein, by his undersigned attorneys, and respectfully represents to the court as follows:

That petitioner is aggrieved by the final decree rendered in the above-entitled cause on the 4th day of March, 1930, in favor of plaintiff and against the defendant in said cause, and that petitioner for the reasons specified in the assignment of errors filed herein desires to appeal from the said final decree and desires that said appeal returnable to the United States Circuit Court of Appeals for the Fifth Circuit, may suspend during the pendency of said appeal the effect of said final decree.

Wherefore petitioner prays that the said appeal may be allowed and that the said appeal may suspend during the pendency of said appeal the effect of said final decree; that said appeal be made returnable to the United States Circuit Court of Appeals for the Fifth Circuit, according to law, and that a transcript of the records and proceedings and papers and exhibits, upon which said final judgment was rendered, duly authenticated, be sent to said Circuit Court of Appeals, and, together with this petition, the petitioner presents his assignment of errors and prayer for reversal.

W. P. HUGHES,
United States Attorney,

H. F. MCCONNELL,
Special Attorney, Bureau of Internal Revenue,
Washington, D. C.,

RAYMOND F. BROWN,
Special Attorney, Bureau of Internal Revenue,
Miami, Florida,
Attorneys for Peter H. Miller, Individually and as Collector of Internal Revenue for the District of Florida,
Defendant and Plaintiff in Error.

[File endorsement omitted.]

36 In United States District Court

[Title omitted.]

Assignment of errors

Filed April 15, 1930

And now comes Peter H. Miller, individually and as collector of internal revenue for the district of Florida, by his attorneys, and in connection with his petition for appeal, says that in the record, proceedings, and in the final decree aforesaid, manifest error has intervened to the prejudice of said Peter H. Miller, individually and as collector of internal revenue for the district of Florida, plaintiff in error, to wit:

1. The final decree is contrary to the evidence.
2. The final decree is contrary to law.
3. The court erred in denying the defendant's motion that the preliminary injunction issued in this cause be vacated, annulled, and set aside and the cause dismissed.
4. The court erred in signing and entering the final decree in this cause and each and every part thereof.
5. For other errors apparent on the record.

By reason whereof plaintiff in error prays that the decree aforesaid may be reversed.

W. P. HUGHES,
United States Attorney,
H. F. MCCONNELL,
Special Attorney, Bureau of Internal Revenue,
Washington, D. C.,
RAYMOND F. BROWN,
Special Attorney, Bureau of Internal Revenue,
Miami, Fla.,
Attorneys for Peter H. Miller, Individually and as Collector of Internal Revenue for the District of Florida,
Plaintiff in Error.

[File endorsement omitted.]

37 In United States District Court

[Title omitted.]

Prayer for reversal

Filed April 15, 1930

To the honorable the Judges of the United State Circuit Court of Appeals of the Fifth Circuit:

Comes now Peter H. Miller, individually and as collector of internal revenue for the district of Florida, plaintiff in error, and prays for a reversal of the final decree specified in his assignment

of error filed herewith, made and entered in the District Court of the United States in and for the Southern District of Florida, in that certain action brought by the Standard Nut Margarine Company of Florida, a corporation, defendant in error named above, against Peter H. Miller, individually and as collector of internal revenue for the district of Florida, plaintiff in error named above.

W. P. HUGHES,
United States Attorney,
H. F. MCCONNELL,
Special Attorney, Bureau of Internal Revenue,
Washington, D. C.,
RAYMOND F. BROWN,
Special Attorney, Bureau of Internal Revenue,
Miami, Fla.,
Attorneys for Peter H. Miller, Individually and as Collector of Internal Revenue for the District of Florida,
Plaintiff in Error.

[File endorsement omitted.]

In United States District Court

In Equity, No. 651 J–Eq.

THE STANDARD NUT MARGARINE COMPANY OF FLORIDA, A CORPORATION, plaintiff

vs.

PETER H. MILLER, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE for the District of Florida, defendant

Order allowing appeal

Filed April 15, 1930

On this 15 day of April, A. D. 1930, came Peter H. Miller, individually and as collector of internal revenue for the district
38 of Florida, defendant in the above-styled cause, by his attorneys, and presented and filed herein his petition for appeal and simultaneously presented and filed with the said petition his assignment of errors intended to be relied upon by him and his prayer for reversal:

Upon consideration whereof, it is ordered that the appeal be, and the same is hereby, granted and allowed to Peter H. Miller, individually and as collector of internal revenue for the district of Florida, petitioner herein and defendant in this suit, from the final decree of March 4, 1930, rendered against the defendant in said cause, and that the said appeal shall suspend during the pendency of said appeal the effect of said final decree, and that said appeal shall be returnable to the United States Circuit Court of Appeals for the

Fifth Circuit, according to law, and that a transcript of records and proceedings and papers and exhibits upon which said final decree was rendered, duly authenticated, shall be filed in the United States Circuit Court of Appeals, according to law, as prayed for by Peter H. Miller, individually and as collector of internal revenue for the district of Florida.

LAKE JONES,
United States District Judge.

[File endorsement omitted.]

In United States District Court

[Title omitted.]

Præcipe for record

Filed April 25, 1930, and refiled Sept. 18, 1930

The clerk of the above-styled court is hereby requested and directed to prepare and certify a transcript of the record in the above-styled cause, for the use of the United States Circuit Court of Appeals for the Fifth Circuit, by including therein the following papers:

1. Bill of complaint.
2. Chancery subpœna.
3. Answer of defendant.
4. Preliminary injunction.
5. Injunction bond.

39 6. Motion of defendant for leave to file amended answer.

7. Stipulation as to filing of amended answer.
8. Order allowing filing of amended answer.
9. Amended answer of defendant.
10. Final decree in favor of complainant and making temporary injunction permanent.

(Sgd.) WILBURN P. HUGHES,
United States Attorney,

(Sgd.) H. F. MCCONNELL,
Special Attorney, Bureau of Internal Revenue, Washington, D. C.,

(Sgd.) RAYMOND F. BROWN,
Special Attorney, Bureau of Internal Revenue, Miami, Florida,
Attorneys for Peter H. Miller, Individually and as Collector of Internal Revenue for the District of Florida, Defendant and Plaintiff in Error.

(Indorsed on back as follows:)

Received this writ at Jacksonville, Florida, September 18, 1930, and executed it at Jacksonville, Florida, the same day, by exhibiting this original writ and delivering a true copy hereof to W. E. Nichol-

son, secretary-treasurer of the Standard Nut Margarine Company, of Florida, a corporation, making known to him the nature of same.

Fees: $2.00.

C. N. HILDRETH, Jr.,
U. S. Marshal,
By (Signed) FRANK A. KOPP, *Deputy.*

Further executed this writ at Jacksonville, Florida, September 18, 1930, by exhibiting this original writ and delivering a true copy hereof to E. T. McIlvaine, of the firm of Milam, McIlvaine & Milam, solicitors for the Standard Nut Margarine Company, of Florida, a corporation.

Fees: $2.00.

C. N. HILDRETH, Jr.,
U. S. Marshal,
By (Signed) W. W. WARD, Jr., *Deputy.*

1844—28—86. Received by U. S. Marshal, So. Dist. of Fla., Sept. 18, 1930, Jacksonville.

[File endorsement omitted.]

40 In United States District Court

[Title omitted.]

Amended præcipe for record

Filed June 11, 1930, and refiled Sept. 18, 1930

The clerk of the above-styled court is hereby requested and directed to prepare and certify a transcript of the record in the above-styled cause, for the use of the United States Circuit Court of Appeals for the Fifth Circuit, by including therein the following papers:

1. Bill of complaint.
2. Chancery subpœna.
3. Answer of defendant.
4. Preliminary injunction.
5. Injunction bond.
6. Motion of defendant for leave to file amended answer.
7. Stipulation as to filing of amended answer.
8. Order allowing filing of amended answer.
9. Amended answer of defendant.
10. Final decree in favor of complainant and making temporary injunction permanent.
11. Notice of appeal.
12. Petition for appeal.
13. Assignment of errors.
14. Prayer for reversal.
15. Order allowing appeal.

16. Præcipe for record.
17. Amended præcipe for record.

(Sgd.) WILBURN P. HUGHES,
United States Attorney,

(Sgd.) H. F. MCCONNELL,
Special Attorney, Bureau of Internal Revenue, Washington, D. C.,

(Sgd.) RAYMOND F. BROWN,
Attorney, Bureau of Internal Revenue, Miami, Florida,
Attorneys for Peter H. Miller, Individually and as Collector of Internal Revenue for the District of Florida, Defendant and Plaintiff in Error.

Received this writ at Jacksonville, Florida, September 18, 1930, and executed it at Jacksonville, Florida, the same day, by exhibiting this original writ and delivering a true copy hereof to W. E.
41 Nicholson, secretary-treasurer of the Standard Nut Margarine Company, of Florida, a corporation, making known to him the nature of same.

Fees: $2.00.

C. N. HILDRETH, Jr.,
U. S. Marshal,
By (Signed) FRANK A. KOPP, *Deputy.*

Further executed this writ at Jacksonville, Florida, September 18, 1930, by exhibiting this original writ and delivering a true copy hereof to E. T. McIlvaine, of the firm of Milam, McIlvaine & Milam, solicitors for the Standard Nut Margarine Company, of Florida, a corporation.

Fees: $2.00.

C. N. HILDRETH, Jr.,
U. S. Marshal,
By (Signed) W. W. WARD, Jr., *Deputy.*

1841—28—86. Received by U. S. marshal, So. Dist. of Fla., Sept. 18, 1930, Jacksonville.

[File endorsement omitted.]

In United States District Court

[Title omitted.]

Motion for order allowing withdrawal of citation, etc.

Filed Sept. 4, 1930

To the honorable Judges of the United States District Court for the Southern District of Florida:

Comes now Peter H. Miller, individually and as collector of internal revenue for the district of Florida, defendant herein, by his

undersigned attorneys, and respectfully represents to the court as follows:

That through inadvertence the citation heretofore signed on the 15th day of April, A. D. 1930, by the honorable Lake Jones, judge of the United States District Court for the Southern District of Florida, now deceased, in the appeal of this petitioner, defendant in the above-styled cause, to the United States Circuit Court of Appeals for the Fifth Circuit from the final decree rendered
42 in the above-entitled cause on the 4th day of March, A. D. 1930, in favor of plaintiff and against the defendant in said cause, was filed in the office of the clerk of the United States District Court for the Southern District of Florida at Jacksonville, Florida, without first being served upon the above-styled plaintiff.

Wherefore petitioner, by his undersigned attorneys, respectfully moves the court for an order allowing the withdrawal of the citation from the office of the clerk of the United States District Court for the Southern District of Florida at Jacksonville, Florida, for the purpose of the service of said citation upon the Standard Nut Margarine Company of Florida, a corporation, the plaintiff in the above-entitled cause, and the refiling of the said citation after said service of the same.

(Sgd.) WILBURN P. HUGHES,
United States Attorney,

(Sgd.) H. F. MCCONNELL,
Special Attorney, Bureau of Internal Revenue, Washington, D. C.,

(Sgd.) RAYMOND F. BROWN,
Special Attorney, Bureau of Internal Revenue, Miami, Florida,

Attorneys for Peter H. Miller, Individually and as Collector of Internal Revenue for the District of Florida, Defendant and Plaintiff in Error.

[File endorsement omitted.]

In United States District Court

[Title omitted.]

Order allowing withdrawal of citation, etc.

Filed Sept. 4, 1930

This cause coming on this day to be heard upon the motion of Peter H. Miller, individually and as collector of internal revenue for the district of Florida, defendant in the above-styled cause, by his attorneys, for an order allowing the withdrawal from the office of the clerk of the United States District Court for the Southern District of Florida at Jacksonville, Florida, of the citation heretofore filed in said office as set forth in said motion for the purpose

of the service of said citation upon the above-styled plaintiff and the refiling of the said citation in said clerk's office after such service has been made, and the matter having been submitted, and the court being fully advised, it is upon consideration ordered and adjudged—

1. That the citation be released by the clerk of the United States District Court for the Southern District of Florida at Jacksonville, Florida, to counsel for Peter H. Miller, individually and as collector of internal revenue for the district of Florida, for service upon the Standard Nut Margarine Company, of Florida, a corporation.

2. That said citation be refiled in said clerk's office after such service has been made as aforesaid.

Done and ordered at Tampa this 4th day of September, A. D. 1930.

(Sgd.) ALEXANDER ACKERMAN,
United States District Judge.

[File endorsement omitted.]

In United States District Court

[Title omitted.]

Motion for order allowing withdrawal of præcipe

Filed Sept. 18, 1930

To the honorable Judges of the United States District Court for the Southern District of Florida:

Comes now Peter H. Miller, individually and as collector of internal revenue for the district of Florida, defendant herein, by his undersigned attorneys, and respectfully represents to the court as follows:

That through inadvertence the præcipe for record, filed April 25, 1930, and the amended præcipe for record, filed June 11, 1930, in the appeal of this petitioner, defendant in the above-styled cause, to the United States Circuit Court of Appeals for the Fifth Circuit from the final decree rendered in the above-entitled cause on the 4th day of March, A. D. 1930, in favor of the plaintiff and against the defendant in said cause, were filed in the office of the clerk of the United States District Court for the Southern District of Florida at Jacksonville, Florida, without first being served upon the above-styled plaintiff.

Wherefore petitioner, by his undersigned attorneys, respectfully moves the court for an order allowing the withdrawal of the præcipe for record and the amended præcipe for record from the office of the clerk of the United States District Court for the Southern District of Florida, at Jacksonville, Florida, for the purpose of the service of said præcipe for record and amended præcipe for record upon the Standard Nut Margarine Company of Florida, a corporation, the plaintiff in the above-entitled cause, and

the refiling of the said præcipe for record and amended præcipe for record after said service of the same.

WILBURN P. HUGHES,
United States Attorney,
H. F. MCCONNELL,
Special Attorney, Bureau of Internal Revenue,
Washington, D. C.,
RAYMOND F. BROWN,
Special Attorney, Bureau of Internal Revenue,
Miami, Florida,
Attorneys for Peter H. Miller, Individually and as Collector of Internal Revenue for the District of Florida,
Defendant and Plaintiff in Error.

[File endorsement omitted.]

In United States District Court

[Title omitted.]

Order allowing withdrawal of præcipe, etc.

Filed Sept. 18, 1930.

This cause coming on this day to be heard upon the motion of Peter H. Miller, individually and as collector of internal revenue for the district of Florida, defendant in the above-styled cause, by his attorneys, for an order allowing the withdrawal from the office of the clerk of the United States District Court for the Southern District of Florida, at Jacksonville, Florida, of the præcipe for record and amended præcipe for record heretofore filed in said office as set forth in said motion, for the purpose of the service of said præcipe for record and amended præcipe for record upon the above-styled plaintiff and the refiling of the said præcipe for record and amended præcipe for record in said clerk's office after such service has been made, and the matter having been submitted, and the Court being fully advised, it is upon consideration ordered and adjudged—

45 1. That the præcipe for record and amended præcipe for record be released by the clerk of the United States District Court for the Southern District of Florida, at Jacksonville, Florida, to counsel for Peter H. Miller, individually and as collector of internal revenue for the district of Florida, for service upon the Standard Nut Margarine Company of Florida, a corporation.

2. That said præcipe for record and amended præcipe for record be refiled in said clerk's office after such service has been made as aforesaid.

Done and ordered at Tampa this 15th day of September, A. D. 1930.

(Sgd.) ALEXANDER AKERMAN,
United States District Judge.

[File endorsement omitted.]

In United States District Court, Southern District of Florida

No. 651–J, Equity

THE STANDARD NUT MARGARINE COMPANY OF FLORIDA, A CORPORATION, plaintiff

vs.

PETER H. MILLER, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE for the District of Florida, defendant

Statement of evidence

Filed Sept. 30, 1930

The above-entitled cause came on for trial at 10.00 o'clock a. m. at Jacksonville, Florida, on Monday, March 3rd, A. D. 1930, before the Honorable Lake Jones.

Appearances: George N. Murdock, Esquire, and E. T. McIlvaine, Esquire, of the firm of Milam, McIlvaine and Milam, solicitors for the plaintiff, and Harrison F. McConnell, Esquire, and Raymond F. Brown, Esquire, solicitors for the defendant.

Whereupon Mr. George N. Murdock made his opening statement of the case to the court.

Motion to dismiss

Whereupon Mr. McConnell made the following motion:

"At this time the defendant moves the court that the preliminary injunction heretofore issued in said cause be vacated, annulled, and set aside, and the cause be dismissed upon the grounds and for the following reasons:

"1. The bill filed herein does not state facts sufficient to entitle plaintiff to any relief, there being no equity stated therein.

"2. The court is without jurisdiction of the cause by reason of the fact there is a defect in the parties appearing upon the face of the bill, in that the United States of America is a necessary
46 and indispensable party to said cause, and not having consented to be sued, and not being a party to said cause, the court is without jurisdiction to proceed.

"3. The court is without jurisdiction to restrain the collection of the tax in question, the bill disclosing that an assessment has been made by the Commissioner of Internal Revenue according to law; that by reason of the provisions of section 3224 of the Revised Statutes of the United States this action is prohibited, and the court has no jurisdiction to restrain the collection of the tax.

"4. The Commissioner of Internal Revenue having determined said product, Southern Nut Product, to be taxable pursuant to and in accordance with the provisions of the act of 1886, as amended, as

disclosed by the bill and that authority, and the authority being invested in him to determine said products pursuant to and in accordance with the provisions of section 14 of the act, the court has no jurisdiction to review the acts of the said commissioner as to the taxability of the said product.

"5. That the bill seeks to enjoin future assessment of taxes, and by reason thereof this court has no jurisdiction to entertain said cause.

"6. Said action seeks to refrain the Commisisoner of Internal Revenue, not a party to this action, from assessing or attempting to assess future taxes against said parties, and by reason of the fact said commissioner is not made a party to said action and can not be made a party to said action by reason of not being within the jurisdiction, said court has no jurisdiction to proceed in said cause."

Whereupon the court stated that motion will be ruled on at the completion of the argument.

Whereupon the remainder of the day was taken up in argument by counsel for the respective parties.

Whereupon court adjourned until 10.00 o'clock a. m., March 4th, 1930, and at 10.00 o'clock a. m., March 4th, 1930, the court reconvened, same parties present as before, and the following further proceedings were had:

Colloquy between court and counsel

By the COURT. Gentlemen, the court has given careful consideration to the arguments presented yesterday on the law of this case. The court has reached this conclusion: I am of the opinion that this case presents a condition within the meaning of Hill versus Wallace. There are a number of elements that make that law applicable, I think. In the first place, I think the purpose of this act of 1886 was not so much the purpose of raising revenue by the Government as it was to regulate the handling of these oleomargarine products.

Within the last fifteen or twenty years we have gone a long way toward a highly centralized government in this country; we run to the Federal Government for almost any kind of things these days. Congress, in order to have jurisdiction within itself, granted powers of the Federal Government as to bring it within one of the grants given to the Federal Government by the Constitution. One of the ways of doing that is making it a revenue act and imposing a
47 tax. That was done in the child labor law; that was done in the Harrison narcotic law. I am not criticising Congress for that, because I realize that this country has gotten so extensive the States are unable to cope with questions and conditions, and we are bound to appeal to the Federal Government. Take, for instance, this fruit-fly situation in this State; it would be physically and financially impossible for the State of Florida to cope with those kind of things.

Now, this bill alleges, and the defendant has admitted in the answer, that the court of Rhode Island has decided that this product, or a similar product as this, is not taxable under this law. The Government undertook, notwithstanding that adjudication of that court, to enforce collection of this tax in that district, and the court did not hesitate to issue an injunction restraining it. The Government comes down here, then, after it has declared itself, and while that might not have the binding force of law—of course this product could not be taxed after that decision; that is quite persuasive to me. I have a great deal of confidence in the officers of the Government who are given discretionary powers, and when they come to a decision they ought to stick to it; but instead of that they come down here and undertake to tax this product regardless of that finding, and in addition to the finding of that court up there, while the issues in the Georgia case were not the same, nevertheless Judge Barrett has unquestionably decided, and the Circuit Court of Appeals of this circuit affirmed, that this product is not made or manufactured in the semblance of butter. If somebody buys that product, fully advised what it is, and wants to use *as* it as butter, that is not fraud on the part of, or the fault of, the manufacturer. You take a great many people to-day use vegetable oils for cooking in the place of lard; people use olive oil; you can go to the store and buy cottonseed oil and know what it is, and you want to use it like you use lard; nobody is misrepresented by that. It is your own doing.

Now, of course, to bring this case outside of section 3224 there must be some extraordinary and unusual conditions. The conditions that I refer to exist, according to this bill, and that is admitted by the answer; but in addition to that an irreparable injury will be done to this plaintiff, under the allegations of the bill, in this way, that he must not only pay this tax, but he must lose and will lose unquestionably a great many of his customers and dealers, both wholesale and retail, because I can readily understand that a wholesale merchant or a retail merchant does not want to take the chance of being inflicted with a very heavy penalty, when not only the nature of the tax or license that he has to pay, but the penalty he will be subjected to if he does not. That brings a reparable injury to this plaintiff, if it is not prevented. In addition to that this action would prevent a multiplicity of suits. How are these people going to get their money back if it is held this property is not within—every one of them, the bill says thousands of people who sell this product, every one of them would have to bring a suit or file a claim and have litigation
48 growing out of that condition, and I say for that reason I am quite sure in my opinion—that this case comes within the exception.

Now, there is only one question about the facts. It is submitted that this product is similar in its constituent parts to the Higgins products, the products that were passed on in the court in Rhode Island; but the answer denies it is the same or similar. How, I do

not know whether it means you mix it differently or not; the Government denies that, and I think that is an important element in this case for this court to pass on. Therefore I do not feel the court is in position to enter a decree solely on this law. In other words, I think the defendant should take this testimony, at least along that line, because there is a controversy over that, and let the court determine then from the facts whether or not it is the same.

You may proceed with the testimony.

By Mr. McConnell. May it please the court, do I understand at this time the motion for final decree is being denied? There are two motions before the court, one was for the entry of final decree and a motion by the defendant for dismissal on the ground of jurisdiction. Those two motions are before the court. For the purpose of the record, do I understand the court is now going to deny that motion for final decree under the law?

By the Court. No; the court has passed on the law, and wants to hear the testimony. I will pass on the question of final decree later.

By Mr. McConnell. I understand you are not passing on either of the motions at this time.

By the Court. No.

By Mr. McConnell. For the purpose of the record, I would like the record to show that at this time the defendant requests a ruling on the two motions now before the court, before testimony is put in as to the facts, just for the purpose of the record.

By the Court. The court will rule on that motion. It will be denied.

By Mr. McConnell. And of course in denying ours, we take exception. The defendant excepts to the denial of the motion made by the defendant.

By Mr. McIlvaine. Counsel is in error when he said we moved for a final decree.

By the Court. I understand that. There was no occasion to make a motion of that kind while the court was hearing this argument on the law.

By Mr. McConnell. That was the express purpose I had in asking if that went into the record, if that was a motion being made for the entry of final decree at that time.

By the Court. I told you that that would be made, not at that time, but at the proper time. I do not think that was the proper time for making it.

By Mr. McConnell. I would like an exception to that.

By the Court. You can take exception to that also.

49 By Mr. McConnell. I take exception to that also.

(Whereupon the witness herein after referred to testified in substance on behalf of the plaintiff in accordance with the following condensed narrative statement of the evidence, save when a proper understanding of the questions presented required parts of the testimony to be set forth otherwise.)

Testimony of Mr. W. E. NICHOLSON.

Direction examination by Mr. MURDOCK:

My name is W. E. Nicholson, and I live in Jacksonville, Florida. I am secretary, treasurer, and manager of the Standard Nut Margarine Company, of Florida.

By Mr. MCCONNELL. Just at this time, we object to the introduction of any testimony upon the ground and for the reason, and I ask at this time that the grounds of the motion be incorporated in this objection.

By the COURT. Very well.

By Mr. MCCONNELL. Upon the grounds:

1. The bill filed herein does not state facts sufficient to entitle plaintiff to any relief, there being no equity stated therein.

2. The court is without jurisdiction of the case by reason of the fact there is a defect in the parties appearing upon the face of the bill, in that the United States of America is a necessary and indispensable party to said cause, and not having consented to be sued, and not being a party to said cause, the court is without jurisdiction to proceed.

3. The court is without jurisdiction to restrain the collection of the tax in question, the bill disclosing that an assessment has been made by the Commissioner of Internal Revenue, according to law; that by reason of the provisions of section 3224, Revised Statute of the United States, this action is prohibited, and the court has no jurisdiction to restrain the collection of the tax.

4. The Commissioner of Internal Revenue having determined said product, Southern Nut Product, to be taxable pursuant to and in accordance with the provisions of the act of 1886, as amended, as disclosed by the bill, and that authority, and the authority being invested in him to determine the said products pursuant to and in accordance with the provisions of section 14 of the act, the court has no jurisdiction to review the acts of the said commissioner as to the taxability of said product.

5. That the bill seeks to enjoin future assessment of taxes, and, by reason thereof, this court has no jurisdiction to entertain said cause.

6. The said action seeks to restrain the Commissioner of Internal Revenue, not a party to this action, from assessing or attempting to assess future taxes against said parties, and by reason of the fact said commissioner is not made a party to said action and can not be made a party to said action by reason of not being within
50 the jurisdiction, said court has no jurisdiction to proceed in said cause.

By the COURT. Objection overruled; exception noted for the defendant.

(Whereupon Mr. Nicholson further testified as follows:)

The nature of the business of the Standard Nut Margarine Company of Florida is the manufacture and sale of nut margarine and nut products. This corporation has been in business in Jacksonville

since 1924. The corporation has been manufacturing and selling the product known as Southern Nut Product since April, 1928. At the time the corporation began the manufacture of Southern Nut Product I had a conversation with a representative of the defendant in this case at his office in Jacksonville relative to the manufacture and sale of that product in this collection district. I visited the office of the collector and talked to Mr. Ball, who was the deputy in charge of the oleomargarine division at this office here some time in March, 1928. Previous to that time Mr. Ball and I had discussed the nut products situation, several nut products were being sold upon our market, taxed free, and we were at that time producing only nut margarine, or nut margarine was taxable by us at ten cents a pound; retail dealers were paying a license of forty-eight dollars a year and wholesale dealers were paying four hundred and eighty dollars a year. I explained to the deputy that we had reached the conclusion after considerable deliberation that we must either manufacture a product of this same kind in order to protect our business against these products which had been declared not taxable, or go out of business, and I asked the deputy to write a letter to the Commissioner of Internal Revenue at Washington stating our case, and ask him for all the rules and regulations pertaining to products of this kind, and also asked him if we might manufacture a product of this kind in our bonded oleomargarine factory. You understand we are bonded as manufacturers to the Government, under license; the premises are designated to the Government, and I wanted a ruling as to whether if we could manufacture such a product, could we manufacture it on these bonded premises. I was advised some days later by the office of the collector that they had received a letter from the commissioner, and was furnished with a certified copy of that letter.

By Mr. MURDOCK. I show you document marked for the purpose of identification "Plaintiff's Exhibit 1," and ask you if that is the copy of the letter which was given to you by the defendant in this case?

By Mr. MCCONNELL. To which the defendant objects upon the grounds and for the reason that it is incompetent.

By the COURT. You better find out if that is a copy or not. You object to it on the ground it is not a copy?

By Mr. MCCONNELL. It purports to be a copy of a communication between the Commissioner of Internal Revenue and the de-
51 fendant. We object upon the ground that it is incompetent, irrelevant, and immaterial so far as any issue in this case is concerned.

By the COURT. Objection overruled; exception noted for the defendant.

By Mr. MURDOCK. Yes or no.

By Mr. NICHOLSON. Yes; that is a copy of the letter.

By Mr. MURDOCK. I offer in evidence plaintiff's Exhibit No. 1.

By the COURT. Is that letter set out in the bill?

By Mr. MURDOCK. It is.

By Mr. NICHOLSON. That is the letter, a part of which is set out in the bill, signed by Commissioner Estes.

By the COURT. Signed by Estes?

By Mr. NICHOLSON. Signed by Commissioner Estes.

By Mr. MCCONNELL. That letter is not set out in the bill, may it please the court.

By Mr. MURDOCK. Part of it, I said.

By Mr. MCCONNELL. In paragraph 13, if the court please, there are certain sentences in this letter which are in this letter, and which are set out in the petition. It does not purport to set out this letter in the bill. There is no date; it is not addressed to anyone, or signed by anyone; no reference to this letter whatsoever.

By Mr. MURDOCK. I simply alleged in the bill a letter was received, and it is the entire letter which I would now like to put in evidence.

By the COURT. What is the materiality of that?

By Mr. MURDOCK. This is the letter upon which the plaintiff relied in the manufacture of its product as being permitted by the revenue department to proceed to manufacture tax free.

By Mr. MCCONNELL. For the purpose of the record, we object to the introduction of plaintiff's Exhibit One upon the ground and for the reason it is incompetent and irrelevant to any issue in the case. The letter is not described or pleaded in the bill. The letter purports to be a communication from the Commissioner of Internal Revenue, not a party to this action, addressed to the collector of internal revenue at Jacksonville.

By the COURT. Objection overruled; exception noted for the defendant.

(Whereupon said letter was filed in evidence and marked "Plaintiff's Exhibit No. 1."

Whereupon Mr. Nicholson further testified as follows:)

I have just mentioned certain products which were being sold on our market tax free. At that time the principal products that had appeared upon our market were the products that we mentioned so much, Higgins Nut Products. Another one by them was known as Nut-Z-All. Another one of theirs known as Penobscot, also one known as Nuine, manufactured by the Baltimore Butterine Company.

52 (A package marked for identification "Plaintiff's Exhibit 2" was shown to the witness and he was asked to explain to the court what it was and whether it was one of the products to which he referred.)

By Mr. NICHOLSON. This product is Higgins Nut Product, and this was the first nut product that I ever saw on the market. It was here as early as 1925, and it is still being sold upon the market in Florida.

By Mr. MCCONNELL. To which we object, if the court please, on the ground it is immaterial, irrelevant, and incompetent so far as any of the issues here are concerned.

By the COURT. Objection overruled; exception noted for the defendant.

(Whereupon Mr. Nicholson further testified as follows:)

This product is a mixture or compound of cocoanut oil, peanut oil, salt, water, and coloring matter. That is stated on the wrapper.

By Mr. MCCONNELL. If the court please, we further object to the introduction of this testimony because there is no proper foundation laid; this witness has not qualified as an expert, nor is he qualified to show any knowledge of the contents of these products.

By the COURT. He has read from the label on the package.

By Mr. MCCONNELL. He is testifying as an expert as to what these products are.

By the COURT. Do you know what this is, Mr. Nicholson?

By Mr. NICHOLSON. I do.

By the COURT. How do you know it?

By Mr. NICHOLSON. I saw it. It says what it is on the label, and I have been familiar with this product.

By the COURT. Did you ever analyze it? Do you know of your own knowledge what this contains here?

By Mr. NICHOLSON. I have not analyzed it.

By the COURT. You couldn't know?

By Mr. NICHOLSON. I can only take their statement.

By the COURT. The objection is sustained; exception noted for the plaintiff.

By Mr. MCCONNELL. I move to strike all that testimony he has given with regard to the Higgins Nut Product.

By the COURT. That motion will be denied; exception noted for the defendant.

(Whereupon Mr. Nicholson further testified as follows:)

The label on this product says, "In making Higgins Nut Product, the following formula is used in accord with the decision of the Federal court," we quote verbatim, and then is the quotation: "In making one hundred pounds of Higgins Nut Product are used eighty pounds of cocoanut oil, twenty pounds of peanut oil, three pounds of salt, one-tenth of one per cent coloring," and it goes on to say, "a duplication of this formula is forbidden except by license from Higgins Manufacturing Company, Providence, Rhode Island." Now, when we began the manufacture of Southern Nut Product we made an investigation of the ingredients of these various
53 products that were on the market. We bought samples of every one we could find on the market and each sample stated on its package of what it was made. We experimented with those ingredients as shown upon these samples and made up a product of the same ingredients as shown on the products. We called our product Southern Nut Product. Our particular reason for so calling it was because in naming, first, you have to pick out a name that is not being used by anyone else, so far as you can determine. We selected the name of "Southern," after giving it consideration, as being a name that was a handy word to everyone; everyone knows

that word and uses that word in this part of the United States, and then we combined that with the words "Nut Products," and perhaps added to our thought of occupying the principal panels of our package with these words in bold type, so that there could be no question in anybody's mind when they looked at that package as to what it was.

By Mr. MURDOCK. I show you plaintiff's Exhibit No. 3 for identification, being a carton of a product, and ask you to explain to the court what it is.

By Mr. NICHOLSON. That is a one-pound package of our products, which we have manufactured and sold since April, 1928, under the label of Southern Nut Products. It is made of cocoanut oil, peanut oil, salt, water, and artificial coloring. The proportion of each ingredient does not remain constant in the various seasons we have in Florida. It varies for this reason, that in warmer months you must manufacture a harder product or it won't stand shipping. Peanut oil is a soft oil, it is a liquid oil at ordinary temperature, and we use less peanut oil in the summer time than we do in the wintertime, or we use less peanut oil the year round here than we would if we were in a colder climate, because if we didn't the product would be so soft we couldn't deliver it to the customer in decent shape. Our carton shows outside on the two principal panels, first, "One pound net." Then in bold type, "Southern Nut Products, artificially colored." On the two secondary panels, I say two secondary side panels, we make this statement: "This product is sold to you entirely on its merits as a nut product, made from cocoanut oil, peanut oil, water, and salt, and is not sold for a substitute for any other product. For cooking, baking, and seasoning. Keep in a cool, dry place." On the end panels we show our name and location, "Standard Nut Margarine Company of Florida, Jacksonville, Florida." On the inside the package is subdivided into four cubes of four ounces each, the four of them together making a one-pound package. Each quarter pound print is wrapped in vegetable parchment upon which is printed the legend, "Four ounces, net weight, Southern Net Products. Pure, clean, and wholesome. Made from pure cocoanut and peanut oils." In comparing the sample of Southern Nut Products with the sample of Higgins Nut Products, the colors are as near identical as we can make them. I have tasted Higgins Nut Products and Southern Nut Products many times, and the taste is the same. There is no odor to either of them.

54 By Mr. MURDOCK. As to the salt content, are they the same as to the amount of salt?

By Mr. MCCONNELL. I object to that; he has already testified he doesn't know what the contents of Higgins Nut Product is; he has not analyzed it.

By the COURT. Objection sustained; exception noted for the plaintiff.

By Mr. MURDOCK. I offer in evidence plaintiff's Exhibits 3 and 2. I don't know that I formally offered Exhibit 2.

By the COURT. Very well; they will be received.

(Whereupon plaintiff's Exhibits Nos. 2 and 3 were filed in evidence.

Whereupon Mr. Nicholson further testified as follows:)

When the corporation began manufacturing I found four different products on the market similar to Southern Nut Product. These products were Higgins, Nut-Z-All, Penobscot, and Nu-ine. Before beginning the manufacture of Southern Nut Product I investigated the history of Higgins Nut Product to find out what the product was. I followed the discussion of the Treasury decision that came along through the department here. I discussed it with another manufacturer, with salesmen from time to time that came along from various carton manufacturers and parchment paper manufacturers and oil refineries. I also made a very careful investigation to find out if these products were taxable.

By Mr. MCCONNELL. Just a minute. Which product are you speaking of, Higgins Nut Product?

By Mr. NICHOLSON. Well, all of them, for that matter. I was familiar with Treasury Decision No. 3590, which was sent out by the department, had a copy of it, in which the product Nut-Z-All was declared not taxable.

By Mr. MURDOCK. I show you a pamphlet marked for identification "Plaintiff's Exhibit 4," and particularly that part found on pages following thirty-five, and designated T. D. 3590, and ask you to state if that is what you received in the way of information from the Treasury Department?

By Mr. NICHOLSON. Yes, sir; this is the Treasury decision that covers the same.

By Mr. MURDOCK. May it please the court, this is a Treasury decision circular by the Treasury Department, which sets out the following decision of the United States District Court for the District of Rhode Island, in the case of Higgins Manufacturing Company versus Frank A. Page, collector. It is published for the information of collectors and others concerned; D. H. Blair, Commissioner of Internal Revenue. I offer in evidence Treasury Decision 3590, contained in this book of Treasury Decisions.

By Mr. MCCONNELL. No objection.

(Whereupon said document was filed in evidence and marked "Plaintiff's Exhibit No. 4.")

55 By Mr. MURDOCK. I particularly call attention to two paragraphs, the first paragraph following: "Brown, Judge: This is an action for the recovery of $16.50 paid under protest as a tax at the rate of ten cents per pound upon 165 pounds of nut products known as Nut-Z-All, a compound containing no animal fats or butter, but composed of cocoanut oil, peanut oil, salt, and artificial coloring matter, which gives it a shade of yellow." And also the four lines on page 39 as follows: "In making one hundred pounds of Nut-Z-All are used eighty pounds of cocoanut oil, twenty pounds of peanut oil, three pounds of salt, and one-tenth of one per cent of butter

coloring. This is substantially different from the products composed of animal fats as butter and milk fats, which were known at the date of the enactment of statute."

By Mr. McCONNELL. If counsel is going to put the regulations in evidence, I propose he put the whole regulation.

By the COURT. He is putting it all in. He is just calling attention to certain parts of it.

(Whereupon Mr. Nicholson further testified as follows:)

When the corporation begin the manufacture of Southern Nut Product I was familiar with Treasury Decision 3590, giving the formula as to the ingredients of the Higgins product and endeavored to make our product as near like that as possible.

By Mr. MURDOCK. I show you a carton marked "Plaintiff's Exhibit 5" for identification and ask you examine that and state whether a product the same as Southern Nut Product was packed and sold in that carton in your market here.

By Mr. NICHOLSON. Mr. Murdock, this carton is the carton of the Baltimore Butterine Company. They formerly called this product Nu-ine, but they have changed the name of it on this carton to the word "Nut-ie." However, that is the same product.

By Mr. McCONNELL. I object to this. There is no proper foundation laid that he ever analyzed this product or knows anything about it.

By Mr. MURDOCK. It is simply a matter of change of name because of the infringement on the part of persons.

By Mr. McCONNELL. He has not shown any qualifiations that he ever analyzed the product or knows the content of it.

By the COURT. You may ask him some questions about it.

By Mr. McCONNELL. Have you ever examined or analyzed this Nut-ie?

By Mr. NICHOLSON. Not Nut-ie.

By Mr. McCONNELL. Or the Baltimore butterine products?

By Mr. NICHOLSON. I have never made an analysis of it.

By Mr. McCONNELL. Then you don't know what the contents are of it?

By Mr. NICHOLSON. All I know is what they say on the carton.

56 By Mr. McCONNELL. Then I object.

By the COURT. Objection sustained. The only evidence he knows is on the carton. Exception noted for the plaintiff.

By Mr. MURDOCK. Now, Mr. Nicholson, I will ask you if you ever made any investigation as to whether Higgins nut product is being sold upon the market in Jacksonville at the present time?

By Mr. NICHOLSON. I have.

By Mr. McCONNELL. To which we object on the ground it is incompetent, immaterial, and irrelevant; has no probative value so far as the issues in this case is concerned.

By the COURT. Objection overruled; exception noted for the defendant.

By Mr. MURDOCK. State whether or not—explain to the court what investigation you made of this matter and when?

By Mr. NICHOLSON. I went out after court yesterday and bought three individual pounds from three grocers. Do you want the names of those stores?

By Mr. MURDOCK. It might be well to put it in the record.

By Mr. NICHOLSON. This pound here was bought from Clark's Market in South Jacksonville.

By Mr. MCCONNELL. To save any further objection, we have a general objection to all this line of testimony.

By the COURT. Yes; and an exception noted.

(Whereupon Mr. Nicholson further testified as follows:)

This product was being offered for sale by this store which sold me one pound of Higgins Nut Product yesterday afternoon. Then this pound I obtained yesterday afternoon from Farris, F-a-r-r-i-s Grocery and Market, at 402 Davis Street. I obtained one more pound from Haddad Grocery and Market, at Pearl and Orange. Then I went to the Daylight Grocery Company, at 308 Broad Street, and asked them to call the wholesale dealer of Higgins Nut Product and purchase a case, which they did, and in turn sold it to me this morning. I have there the invoices from the wholesale dealer to the Daylight Grocery and the invoice or bill of sale from the Daylight Grocery to me of one case, sixteen pounds, of Higgins Nut Product in quarter-pound prints, which is that case there. That case is marked with the wholesaler's name stenciled upon it as it was shipped to him, Farris & Company, Jacksonville.

By Mr. MURDOCK. Now, Mr. Nicholson, were any of these purchases of Higgins Nut Product that you bought tax paid as oleomargarine?

By Mr. NICHOLSON. None.

By Mr. MCCONNELL. I object unless he shows qualification whether he had any knowledge.

By Mr. MURDOCK. Do you know whether they were taxable or not?

By Mr. NICHOLSON. I know positively that that box is not tax paid.

By Mr. MURDOCK. How do you know that?

57 By Mr. NICHOLSON. Because there is no revenue stamp on it and no indication it has been tax paid.

By Mr. MURDOCK. I show you a document marked for identification purposes, "Plaintiff's Exhibit 6," and ask you to state what that is.

By Mr. NICHOLSON. That is a bill of sale from the Daylight Grocery and Market, on 308 Broad Street, to me personally, for sixteen pounds of Higgins Nut Products, which was bought to-day and marked paid on March 4, 1930.

By Mr. MURDOCK. I offer that in evidence as plaintiff's Exhibit 6.

By Mr. MCCONNELL. To which we object upon the ground it is immaterial, irrelevant, and incompetent. May it please the court, I don't see the materiality of all the purchases.

By the COURT. I see a very great deal of materiality. The objection is overruled.

By Mr. MCCONNELL. Exception.

By the COURT. Exception is noted. It is showing the conditions that the bill of complaint objects to; it is very material.

(Whereupon the paper referred to was received and filed in evidence and marked "Plaintiff's Exhibit No. 7.".

Whereupon Mr. Nicholson further testified as follows:)

I am familiar with the business of this line of products in this territory and in this State. It is a matter of common knowledge among people in this business that the Higgins Nut Product has not been required to pay any oleomargarine tax or their dealers take out a special license. We have been solicited to handle and deal in Higgins Nut Product because it did not require the payment of a tax. The Higgins Manufacturing Company have wired, written, and personally called upon us—called upon me individually and upon me as representing the company, have asked us to try—to sell us upon the proposition of taking for distribution their product, an exclusive agency for this product throughout the Southeastern States. Their proposition was to ship it to us at Jacksonville in carload lots and have us sell it to the trade throughout the Southeastern States with our sales organization. They came to us with a proposition guaranteeing us—or guaranteeing us and our customers—to be free from any harm that might come from any future tax or license that might be assessed—they agreeing to assume that responsibility, take it off our hands. They urged us to take the product. We sold Southern Nut Product tax free up until September of this—of 1929—the exact date I don't remember. And we sold some—a part of our output in September, 1929, was tax free and the other part was tax paid. Since that time it has all been tax paid as colored oleomargarine. Then we stopped selling it tax free because the department ruled that it was taxable, and issued broadcast information; they told us and they told everybody else that all the dealers would have to have a license, wholesale and retail license, after October 1st, and give them that much time to
58 clean up their stock. Told us it would be tax paid. They issued instructions to the collectors of all the districts that all such products would be tax paid. At the time this notice was broadcast the extent of our business in this product was over one hundred thousand pounds a month. We had twenty jobbers. The jobbers had retailers, of course, but we sold in this territory over which we—we cover the section around Jacksonville with salesmen of our own and act as our own wholesale agent at this point. We were selling this product to approximately, well, from two hundred to two hundred fifty retail accounts at the time the tax went on, and twenty wholesale accounts. At the present time, after being required to treat this as oleomargarine and tax pay it as the same—we have three wholesale accounts and not over two hundred seventy-five retail—that is, the jobbers and all. We, as a jobber, only have about thirty-five

retail accounts now. Prior to the ruling by the department there were two of our twenty jobbers who had oleomargarine licenses and dealt in oleomargarine. Under the department's ruling we didn't dare to sell to any dealer or wholesaler who did not have a license. A demand has been made upon us for the payment, as a manufacturer, of tax upon our product.

By Mr. MURDOCK. I show you plaintiff's exhibit for identification purposes number nine, and ask you to explain to the court what that is.

By Mr. NICHOLSON. Well, this is a notice and demand for tax, which was served upon us in April, 1929, the description, stamp tax at ten cents per pound as colored oleomargarine on fifty thousand pounds of Southern Nut Product manufactured during January, 1929.

By Mr. MURDOCK. Have you ever paid that tax?

By Mr. NICHOLSON. That tax has not been paid. Refused to pay it.

By Mr. MURDOCK. Is there demand still being made for it?

By Mr. NICHOLSON. Demand still stands; assessed on the books against us.

By Mr. MCCONNELL. I object as not responsive—asking if demands are still being made.

By the COURT. Read me the objection.

By the REPORTER. Objected to as not responsive.

By the COURT. Is that all the objections?

By Mr. MCCONNELL. He asked him if he was still making demand; he says, "No; the demand still stands." In other words, as I understand it, there was one demand made.

By the COURT. Well, he has never paid it; that is sufficient. The object is sustained; exception noted.

By Mr. MURDOCK. I offer in evidence plaintiff's Exhibit No. 9. Would the court care to examine it?

By Mr. MCCONNELL. No objection.

(Whereupon said paper was admitted in evidence and filed as plaintiff's Exhibit No. 9.

Whereupon Mr. Nicholson further testified as follows:)

59 We had a mimeographed memorandum from the revenue department and which was broadcast to the trade, stating that our product would be taxable after October 1st and our jobbers and retailers also required to hold license. We didn't know what to do with respect to our retailers' licenses when this tax went on. We wanted to stay on the market. In order to do that we would have to pay a tax of ten cents a pound. We wanted to keep our salesmen employed so we wouldn't have to discharge them, as well as *as* much of our factory help as possible. Wanted to maintain our identity with the trade. We would have to pay a tax of ten cents a pound, retailers would have to have a license; their licenses had to start the first of October, must be prepaid through June 30th following; that meant thirty-six dollars a store. We went out and talked to retail dealers first, and we discovered that they were very sympathetic to our cause,

and very much opposed to this tax. And we determined that if we could make them some sort of a fair proposition, that is, a proposition that would demonstrate our willingness to do everything possible to keep the situation going and keep it alive, that they would accept it. So we made the general proposition to retail dealers that if they would take out, or make an application for this colored retail license at thirty-six dollars, we would furnish half the money. In other words, they pay eighteen and we pay eighteen. And we paid over four thousand five hundred dollars cash money into this license. Those licenses expire June 30, 1930. Under the present conditions it would be impossible for our company to continue to exist and sell its products in competition with the Higgins Nut Product, which is tax free, and continue to pay these licenses and the tax. Our approximate wholesale price on Southern Nut Products is twenty cents besides the tax.

Cross-examination by Mr. McCONNELL:

Q. How long have you been manufacturing these products here in Jacksonville?

A. Which products do you refer to, Mr. McConnell?

Q. This nut product.

A. Since April, 1928.

Q. And before that time you were engaged, were you not, in the manufacture of what you call the Southern Nut Oleomargarine?

A. No; we were not.

Q. Aren't you manufacturing now an artificial nut product oleomargarine?

A. We are not.

Q. Outside of this product?

A. No—yes; Standard Nut Margarine.

Q. Did you ever, at any time, manufacture before this—the manufacture of this nut product—an artificially colored oleomargarine?

A. Oh, yes.

Q. And you were in that business at the time that you went into the manufacture of this Southern Nut Product?

60 A. Yes.

Q. Why did you want to go into—manufacture the Southern Nut Product?

A. To protect our business.

Q. In what way?

A. We weren't able to compete with the tax-free goods and pay ten cents a pound and help dealers buy licenses at forty-eight dollars a year.

Q. How many places are selling this Higgins product here now in Jacksonville?

A. That I couldn't say.

Q. Do you know of over one or two places?

A. Yes.

Q. How many would you say are selling it?

A. I bought in four places yesterday afternoon.

Q. Have you any idea, during your investigation, have you formed any opinion as to how many pounds daily is being sold here, from your investigation?

A. It would be impossible for me to form a conclusion to that effect.

Q. Do you know how many pounds daily, or how many places are handling this Higgins product in Miami?

A. No.

Q. You made no investigation?

A. No, Mr. McConnell; we don't call—our salesmen, you understand, are working the retail trade; that is, these colored licenses, and they are selling our product.

Q. But you are contending that this product is putting you out of business on account of the competition. Now, I want to find out if you know how many places are handling this product in the State of Florida; how many places it is being sold.

A. No; but I know it is being generally sold.

Q. Have you got any idea as to the number of pounds being sold in the State?

A. I have not. I have no way of arriving at that opinion.

Q. How many pounds of that Southern Nut Product did you manufacture in October?

A. In October, this year? Approximately forty thousand pounds.

Q. And November, how many did you manufacture?

A. It has run fairly close to that figure ever since then.

Q. And in January you manufactured sixty thousand pounds, about?

A. No.

Q. How much?

A. I didn't manufacture as much in January as I did in December and November.

Q. You are filing returns now to the collector's office, are you not?

A. I am.

61 Q. Do you remember what those returns show for the month of January this year?

A. Not exactly; I haven't the exact figures. But those figures included both colored nut margarine—that is, oleomargarine, you understand, and colored nut products. We have to make up a return in Form No. 216; the front sheet of which shows how many revenue stamps we buy, then it shows how much goods withdrawn tax paid during the month. Now, that will account for so many revenue stamps, subtracted from the balance forward, balance purchases, subtract your tax paid, leave you a balance on hand; and the Government reports which we are now submitting on colored ten-cent tax-paid goods includes both the colored nut margarine and the Southern Nut Products.

Q. But you say you have been making at least forty thousand pounds or more per month ever since?

A. Approximately forty thousand pounds.

Q. It hasn't been dropping off at all, has it, since October?

A. It has.

Q. If you have been making forty thousand pounds since October a month, how has it been falling off? The trade hasn't been falling off?

A. The poundage is dropping slowly; it is slow death, Mr. McConnell. It is gradually dwindling.

Q. How slow is it dropping; how many pounds are you losing a month in the manufacture?

A. Well, it seems currently we are losing a couple of thousand pounds a month, as the months go along; when it is winter time we should be increasing.

Q. The price of butter in the State of Florida right now is way down, is it not?

A. The price of butter is pretty variable.

Q. Right now it is very low?

A. Butter is very low.

Q. You sell this Southern Nut Product for approximately forty cents a pound, don't you—thirty-nine to forty cents?

A. It retails from thirty-five to forty cents.

Q. And the price of butter at the present time is below that, is it not?

A. The lowest I have seen butter advertised is thirty-five cents; and it sells all the way up to fifty-five and sixty cents a pound.

Q. Butter is a competitor in your market, is it not, your Southern Nut Product market?

A. As a cooking compound, it is.

Q. Well, for all purposes that cooking compound is used for butter is a competitor, isn't it?

A. When butter gets that cheap it perhaps has some effect upon the market of this kind, because people find they can buy butter for thirty-five cents a pound; they take that home to fry with and make their cakes with.

62 Q. Do you use this product, your Southern Nut Product, for the purpose of frying, baking, cooking?

A. Yes.

Q. It is used for a spread on bread, too, is it not?

A. I don't use it for a spread on bread.

Q. It can be used?

A. We don't recommend it for that.

Q. It can be used?

A. If softened enough, certainly; anything can be used——

Q. It is suitable for that purpose?

A. Not suitable or desirable.

Q. It could be used that way?

A. If you soften it enough, as anything else of a plastic consistency can be spread upon bread.

Q. Your artificially colored oleomargarine is used for a spread on bread?

A. That made with more peanut oil; it is made with milk and milk is——

Q. You mean it is churned in milk?

A. It is churned with milk—in milk; yes. That milk is a natural emulsifying agent and splits that fat down to almost the consistency of butter; that makes it——

Q. Practically the only difference between your colored oleomargarine and your Southern Nut Product is about the nine per cent of casein in the milk that is in it, therefore——

A. Milk and the benzoate of soda.

Q. And there is about nine per cent of casein; in other words, milk is about ninety-two per cent water, isn't it?

A. Well, the way we make——

Q. Well, isn't it? Isn't that a matter of fact, milk is about ninety-two per cent water?

A. That is perhaps approximate.

Q. You have about eight per cent casein in it?

A. Yes.

Q. Casein has no food value, has it?

A. Yes.

Q. What?

A. Yes.

Q. The purpose of casein, and the only thing it does, is to make a smoother product?

A. Makes it smoother and gives it a butter flavor; butter gives its flavor from this casein that is left in the butter; when you churn butter you have a certain amount of sour milk, and your butter fat is never completely isolated from the milk, and that milk sours——

Q. Are you a chemist?

A. Why, I have studied chemistry. I don't qualify myself as a chemist.

Q. You don't qualify as a chemist?

A. No.

63 Q. And you never have made an analysis of these other products?

A. I have no equipment for analyzing.

Q. When you went into the manufacture of these products you got a copy of this letter here which is plaintiff's Exhibit 1, from the collector's office?

A. Yes, sir.

Q. And you knew in this letter that these products were held by the Government to be taxable?

A. I knew before that that they had.

Q. You knew this letter said these products were held to be taxable?

A. I knew before that that they had.

Q. You knew this letter said these products were held to be taxable?

A. No; that said we may make a product of that kind without tax-paying same.

Q. What did you think when you read this: "While this office considers such compounds are properly taxable under the law, under certain decisions at the present time, there is no attempt being made to hold them taxable at the present time."

A. I thought that was just a repetition of the proposition they had brought into effect by promulgating Treasury Decision 4006, which said all these products would be taxable on a certain date; if I remember correctly, October 1, 1929. Then they later amended that and said, "We will wait until January," and "Wait until July"; and then they came along and threw the whole thing out, said, "We can't tax it."

Q. But you knew at the time that you made the inquiry the department considered them taxable?

A. I know they wanted to make them taxable. They said in that letter they held them taxable.

Q. Well, the letter simply said they weren't collecting the tax at the present time; and you knew the department had determined them taxable?

A. Yes; they weren't holding the——

Q. So, with that knowledge, you went into the manufacture?

A. They said there were——

Q. But they said you went in there practically at your own peril; the letter infers that.

A. The letter says that they can't tax them, and we should be entitled to the same privileges being enjoyed by the other manufacturers, without taxpaying the same; and that was the authority right there that we took; and we obtained that authority before we ever manufactured a pound of this. We wouldn't go off without knowing——

Q. This is the only authority or communication you have ever had from the department with reference to these products?

64 A. Oh, we have several other communications; we have a tax demand.

Q. I mean communications, whether or not you would be liable for tax.

A. The collector was advised here, and I think we have a copy of that letter, that our stuff would be taxable, last fall when we started tax-paying it.

Q. That is the general letter that went out?

A. I think so; yes.

Q. When you first started to manufacture this stuff, how much were you making of it?

A. We didn't make a great deal to start with.

Q. When is the time you had the largest production and sale of this product?

A. I guess last September—October; I mean September and August.

Q. Now, when you went into the manufacture of this product, you used the same machinery you used for making your nut oleo?

A. We got a ruling on that.

Q. And you used the same products that went into the oleomargarine, except that is churned in water, and the other is churned in milk?

A. Yes; and the preservative.

Q. When this product came into the market down here, that was a competitor of butter, wasn't it, the Higgins product? That was a competitor of the butter market?

A. We don't sell butter.

Q. I am not asking you that; I am asking if the Higgins product wasn't a competitor of butter?

A. It was competing with our product.

By Mr. McConnell. I move to strike his answer—just a minute: I am asking you, when the Higgins product came down here, was it not a competitor on the butter market?

A. I should answer that question yes, Mr. McConnell just——

Q. Just a minute——

By the Court. Let him explain.

A. Just the saame as lard or any kind of shortening you see on the market, or compound lard, is a competitor of butter. If you put lard in a skillet and fry a steak with it, and you have been using butter, you are substituting for butter, you can't help it if you do it. And certainly this product would substitute for butter in that case; there is no way you can reason out any other conclusion.

By Mr. McConnell. I move to strike all the answer as not responsive to my question yet.

By the Court. The motion is denied, and exception noted.

Q. How much of your artificially colored oleomargarine were you selling at the time you went into the manufacture of Southern Nut Product?

65 A. The Government has a record of that.

Q. Well, do you know?

A. Probably, as near as I can remember, twenty to thirty thousand pounds a month.

Q. Of artificially colored oleomargarine?

A. I won't substantiate that; I can't remember definitely, but it was no great amount greater than that.

Q. And have your sales of that increased or decreased since you went in the manufacture of Southern Nut Products?

A. They have almost held their own. They have stayed along very well, because we had a certain line of trade that we have always continued to sell the tax-paid goods to right straight through; retailers who are handling the artificially colored nut oleo on the license of forty-eight dollars a year, of course discontinued that and started handling the other; that took away some business.

A. Well, Mr. McConnell, we are assessed on that basis and we are violating right now the Government—the commissioner's——

Q. And you filed a claim for compromise of that tax?

A. May I explain the way we are assessed for that?

Q. Yes; I know.

A. The commissioner sent the collector here a letter telling him that this stuff was not taxable. Here was an assessment of five thousand dollars on an arbitrary estimated amount of fifty thousand pounds for January, 1929. He said, "Send the deputy, personally deliver this assessment, and have the deputy go over the records of that company and ascertain the number of pounds, and then we will make a correct assessment." We simply said at that time that "These goods are not oleomargarine. You have no right to the record and we refuse to pay and we refuse to let you inspect." And the letter sent to the collector, "If you are refused this, don't do anything else until you write to us." And so I did refuse it, and that was the last that has been heard of it. But they haven't abated this tax or taken it off. It still stands against us.

Q. The offer in compromise is still pending before the commissioner?

A. Our understanding is that that offer is not going to be accepted.

Q. You have no communication that they won't accept it?

A. No.

Q. You know, as a matter of fact, that all the concerns over the United States submitted offers in compromise the same as you did?

By Mr. MURDOCK. I object. That is going rather far afield from what applied to this particular plaintiff.

By the COURT. The objection is overruled; exception noted.

68 Q. Read the question.

A. Well, I know what the question was.

(The question was read by the reporter.)

Q. That is, I mean concerns manufacturing products similar to yours.

A. I don't think Higgins Manufacturing Company did.

Q. Practically all of the others?

A. I don't know who all the others were, Mr. McConnell, but a great many of them did; yes.

Q. And the commissioner suggested at the time of your conference in Washington that you file these offers in compromise?

A. I believe that is correct.

Q. And that in due course, as soon as the matters could be determined by the Supreme Court, that these would be acted upon; is that true?

A. You are getting into a matter of understandings there.

Q. That was at the conference?

A. I am not in position to testify competently on—our thought of the thing was that they were going to wind up the whole business and stop everybody and compromise it and settle it; that was what they wanted to do. And our understanding was they were going to

accept our offer to compromise and put everybody on the same footing. And it was our understanding that Higgins was to be stopped.

Q. Outside of the Higgins people, do you know of anybody else manufacturing these products now?

A. We are manufacturing them.

Q. Outside of you and the Higgins people?

A. No.

Q. They all filed their offers in compromise and decided to keep manufacturing these products?

A. That was the proposition.

Q. And the understanding was with the commissioner that some nominal amount would be accepted?

A. Yes, sir.

Q. Back taxes as they accrued?

A. That is right.

Q. And if the Supreme Court should decide the products not taxable, therefore there would be nothing due; that was understood, wasn't it?

A. That would be assumed.

Q. And that the offers in compromise would be held there until the court had determined?

A. I didn't have that understanding.

Q. Didn't you learn that through your counsel that the Government is making no move to put anybody out of business or
69 collect any of this tax at the present time? Hasn't your counsel advised you of that?

A. That we are——

Q. That the Government is making no move to collect any of this tax or to put any concern out of business until the Supreme Court of the United States has fully determined the taxability of these products?

A. That that has happened?

Q. Hasn't your counsel advised you of that?

A. I haven't understood that at all.

Q. Your counsel has never advised you of that?

A. No.

Q. Have you made any inquiry as to what the attitude of the department was going to be?

A. We didn't need to make any. We knew what the attitude of the department was.

Q. With reference to putting you out of business?

A. Yes, sir.

Q. What reason have you to say that the Government is going to seize or take your plant for the payment of these taxes?

A. Just the general attitude of the department.

Q. Has any overture been made by any officer of the Government to seize your property or confiscate it?

A. Yes.

Q. Any effort been made to seize or confiscate your plant for back or future taxes?

A. It seems to me that——

Q. Will you please answer my question?

By the COURT. Read him the question.

(The question was read.)

A. No.

Q. And you have no fear right now that the Government is going to come in and seize your plant or interfere with your business in any way whatsoever until these products have been determined taxable by the Supreme Court of the United States?

A. I don't have any—I don't feel very certain about the situation at all. What I mean is I feel like there is—with the department having rumored these products to be taxable, on top of the fact that they told us to go ahead and make them, then they came around and said they are taxable; it is hard to tell what might happen. We feel very uneasy about it.

Q. That wasn't what I asked you. I will put it this way: Have you any basis or grounds for believing that any harm will be done your business or your plant by the Government in attempting to force or collect any taxes until this matter has been decided by the Supreme Court?

A. I know that the history of the department——

70 Q. Answer my question.

A. Yes.

Q. What is your fear; what is it based on?

A. The history of the department's action is that when they get the upper hand of the situation they make it mighty hard for the taxpayer.

Q. That's your only answer?

A. That is my answer.

By Mr. MCCONNELL. That's all.

Redirect examination by Mr. MURDOCK:

Q. Mr. Nicholson, I show you a document marked for identification "Plaintiff's Exhibit No. 10" and ask you to explain to the court what that is, if you know. When did you see it before and where did you get it?

A. This is a copy of a letter sent out by the commissioner, Mr. Lucas, to the collector of internal revenue on August 24th, and he says there that it is the purpose of the bureau——

By Mr. MCCONNELL. Just a minute.

By the COURT. Don't read the letter.

A. Well, this is the letter where they tell you your stuff has got tax on it.

Q. Where did you get that?

A. I got that through the mail from the department here.

By Mr. MCCONNELL. What is this, a copy? Just a moment, if the court please, may I ask the witness a question?

By the COURT. Yes.

By Mr. McConnell. Where did you get this?

A. As I remember, that letter came to me through the mail from the local office.

Q. Was there any other letter or communication with it?

A. No; they multigraphed this—that is not the one received here; no.

Q. Where did you get that?

A. I don't remember whether I sent this—I probably sent this to counsel and he probably made a copy of it; I don't know.

By Mr. McConnell. I object to it on the ground that it is not the best evidence; that is a copy.

By Mr. Murdock. This is the same as the one you received from the local collector's office?

A. Yes.

By the Court. Objection overruled; exception noted for the defendant. Let it be received in evidence.

(Whereupon the letter referred to was received in evidence and marked "Plaintiff's Exhibit No. 10.")

By Mr. Murdock. I would like to read this letter to the court. It is dated August 24, 1929.

(Whereupon the letter was read to the court by Mr. Murdock.)

71 Q. Mr. Nicholson, state whether that letter was given publicity in this district through the newspapers, and other ways.

A. It was. It was handed to the newspapers. I know that the department here gave the letter to the Times-Union, the local newspaper here, and was published, a rather distorted article, as they twisted it around and made it even worse than it was.

Q. As a result of that letter, or at least on October 1, 1925, were you able to continue selling to these customers who did not have retail license?

A. Oh, no; I wouldn't dare.

Q. And you have not since that time?

A. No, sir.

Q. Now, a matter of compromise was mentioned here on cross-examination. Was it your understanding that that nominal offer and compromise should be immediately accepted by the department?

A. That was my understanding.

Q. Was that the understanding given to you by the deputy commissioner?

A. I didn't attend that conference, Mr. Murdock, you remember.

Q. I see. When was that compromise offer made to the Government, if you know?

A. It was made in September, I am pretty sure.

Q. 1929?

A. 1929.

Q. Have you ever heard of it being accepted?

A. No.

Q. Has it ever been accepted?

A. No; not to my knowledge.

Q. Now, you stated that from October you have been able to sell about forty thousand pounds of Southern Nut Product per month. What was the amount sold prior to that time per month?

A. Three to four times that much.

Recross-examination by Mr. McConnell:

Q. Was any of that loss of your alleged business due to any other cause that you know of?

A. No.

Q. Might it have been due to that?

A. Sir?

Q. Might it have been attributed to some other cause other than the tax of the product?

A. I am quite well convinced I would not have gone backward in business, Mr. McConnell, had not the tax gone off. We would have been in stronger position to-day than when we started.

Q. In other words, you say the loss of business was due to the tax being put on?

A. And the license.

Q. Do you know, as a matter of fact, the Government has been undertaking to get evidence of the Higgins product?

72 A. You have stated that to me.

Q. Do you know the agents of the department have been getting evidence throughout the State for the purpose of——

A. You asked me for names or places where you could do that.

Q. You told me you did not know of any.

A. I told you it was not my business.

Q. Still you say they are interfering with your business indirectly, because you want to——

A. We contend if they can make a tax-free product of this kind, we can do the same thing. We don't have to buy their product from them and sell it.

Q. Didn't I ask you this, if the Government stopped the Higgins people from manufacturing, would you voluntarily stop?

A. We would not voluntarily stop; no.

Q. In other words, you want to manufacture this stuff tax free, irrespective of competition or anything else?

A. Our contention is that this is a tax-free item. That is why we are in court.

Q. And that is the purpose of this suit, to have this court hold it tax free?

A. Yes; same as the other people.

By Mr. McConnell. That's all.

(Whereupon the witness, Mr. Nicholson, was excused.)

By Mr. Murdock. The plaintiff rests, your honor.

Motion to dismiss

By Mr. McConnell. At this time, may it please the court, the defendant wishes to renew the original motion of yesterday for a dismission, upon the grounds as set forth therein, which is in the following words and figures, to wit:

1. The bill filed herein does not state facts sufficient to entitle plaintiff to any relief, there being no equity stated therein.

2. The court is without jurisdiction of the cause by reason of the fact there is a defect in the parties appearing upon the face of the bill, in that the United States of America is a necessary and indispensable party to said cause, and not having consented to be sued, and not being a party to said cause, the court is without jurisdiction to proceed.

3. The court is without jurisdiction to restrain the collection of the tax in question, the bill disclosing that an assessment has been made by the Commissioner of Internal Revenue according to law; that by reason of the provisions of section 3224 of the Revised Statutes of the United States, this action is prohibited, and the court has no jurisdiction to restrain the collection of the tax.

4. The Commissioner of Internal Revenue having determined said product, Southern Nut Product, to be taxable pursuant to and in accordance with the provisions of the act of 1886, as amended, as disclosed by the bill, and that authority, and the authority being invested in him to determine said products pursuant to and in accordance with the provisions of section 14 of the act, the court has
73 no jurisdiction to review the acts of the said commissioner as to the taxability of the said product.

5. That the bill seeks to enjoin future assessment of taxes and by reason thereof this court has no jurisdiction to entertain said cause.

6. Said action seeks to refrain the Commissioner of Internal Revenue, not a party to this action, from assessing or attempting to assess future taxes against said parties, and by reason of the fact said commissioner is not made a party to said action and can not be made a party to said action by reason of not being within the jurisdiction, said court has no jurisdiction to proceed in said cause.

And I have an additional ground to add:

7. That the evidence before the court is insufficient to prove any of the averments of the plaintiff's bill, and is insufficient to establish any equitable relief as prayed for therein.

By the Court. Motion denied, exception noted for the defendant.

By Mr. McConnell. The defendant rests.

By the Court. Let a decree be entered in accordance with the prayer of the bill. I think the essential averments of this bill have been shown here. This testimony shows that the Government has put everybody out of business manufacturing this product except the Higgins Products Company, and this man, who seems to be hanging on by his eyelash. I think he is entitled to the relief prayed for.

You submit the form of the order to Mr. McConnell, and let the bond be the same as it was in the other.

By Mr. McCONNELL. May we have our exception?

By the COURT. Yes. Exception noted.

By Mr. McILVAINE. If the court please, there would be no bond in a final decree.

By the COURT. Oh, no; that is true.

By the COURT. Court will stand adjourned until further order.

I do hereby certify that the foregoing statement of evidence contains in condensed and narrative form the substance of the evidence introduced in the trial of the foregoing cause, save when a proper understanding of the questions presented require parts of the testimony to be set forth otherwise, it being my judgment that, for a proper consideration of said cause upon appeal, it is necessary that certain parts of the evidence be reproduced in the exact words of the witness, together with the exceptions and other proceedings during the progress of said trial.

Done at Jacksonville, Florida, this 30th day of September, A. D. 1930.

(Signed) ALEXANDER AKERMAN,
United States District Judge

[File indorsement omitted.]

74 In United States District Court

[Title omitted.]

Notice of præcipe indicating portions of the record to be incorporated into the transcript upon appeal

Filed Sept. 18, 1930

To THE STANDARD NUT MARGARINE COMPANY OF FLORIDA,
A Corporation, Jacksonville, Florida.
Messrs. GEO. W. MURDOCK,
MILAM, McILVAINE & MILAM,
Solicitors for the Standard Nut Margarine Company of Florida, a Corporation, Appellee,
Greenleaf & Crosby Building,
Jacksonville, Florida.

SIRS: Please take notice that the appellant's statement of the evidence in this cause was this day lodged in the office of the clerk of the United States District Court for the Southern District of Florida for your examination; and that on the 30th day of September, 1930, in the United States court rooms, Jacksonville, Florida, at 9.45 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, we will ask the Honorable Alexander Akerman, United States district judge, to approve said statement; and you and each of you are hereby requested to serve upon us, on or before the 29th

day of September, 1930, your objections and proposed amendments, if any, to said statement.

Please take further notice that the appellant designates the following as the portions of the record in this cause to be incorporated into the transcript on his appeal: (1) Bill of complaint; (2) chancery subpœna; (3) answer of defendant; (4) preliminary injunction; (5) injunction bond; (6) motion of defendant for leave to file amended answer; (7) stipulation as to filing of amended answer; (8) order allowing filing of amended answer; (9) amended answer of defendant; (10) final decree in favor of complainant and making temporary injunction permanent; (11) notice of appeal; (12) petition for appeal; (13) assignment of errors; (14) prayer for reversal; (15) order allowing appeal; (16) præcipe for record; (17) amended præcipe for record; (18) motion for an order allowing the withdrawal of the citation from the office of the clerk of the United States District Court for the Southern District of Florida for the purpose of the service of said citation and the refiling of the said citation after said service of the same; (19) order
75 allowing the withdrawal of the citation from the office of the clerk of the United States District Court for the Southern District of Florida for the purpose of the service of said citation and the refiling of the said citation after said service of the same; (20) motion for an order allowing the withdrawal of the præcipe for record and the amended præcipe for record from the office of the clerk of the United States District Court for the Southern District of Florida for the purpose of the service of said præcipe for record and amended præcipe for record and the refiling of the said præcipe for record and amended præcipe for record after said service of the same; (21) order allowing the withdrawal of the præcipe for record and the amended præcipe for record from the office of the clerk of the United States District Court for the Southern District of Florida for the purpose of the service of said præcipe for record and amended præcipe for record and the refiling of the said præcipe for record and amended præcipe for record after said service of the same; (22) amended præcipe for record; (23) notice of præcipe indicating portions of the record to be incorporated into the transcript upon appeal; (24) statement of evidence.

Dated Jacksonville, Florida, September 18, 1930.

(Sgd.) WILBURN P. HUGHES,
United States Attorney,

(Sgd.) H. F. MCCONNELL,
Special Attorney, Bureau of Internal Revenue,
Washington, D. C.,

(Sgd.) RAYMOND F. BROWN,
Special Attorney, Bureau of Internal Revenue,
Miami, Florida.,

Attorneys for Peter H. Miller, Individually and as Collector of Internal Revenue for the District of Florida, Defendant and Plaintiff in Error.

(Indorsed on back as follows:)

Received this writ at Jacksonville, Florida, September 18, 1930, and executed it at Jacksonville, Florida, the same day, by exihibiting this original writ and delivering a true copy hereof to W. E. Nicholson, secretary & treasurer of the Standard Nut Margarine Company of Florida, a corporation, making known to him the nature of same.

Fees: $2.00.

C. N. HILDRETH, Jr.,
U. S. Marshal,
By (Signed) FRANK A. KOPP, *Deputy.*

Further executed this writ at Jacksonville, Florida, September 18, 1930, by exhibiting this original writ and delivering a true copy hereof to E. T. McIlvaine, of the firm of Milam, McIlvaine &
76 Milam, solicitors for the Standard Nut Margarine Company of Florida, a corporation.

Fees: $2.00.

C. N. HILDRETH, Jr.,
U. S. Marshal,
By (Signed) W. W. WARD, Jr., *Deputy.*

1844—28—110. Received by U. S. Marshal, So. Dist. of Fla., Sept. 18, 1830, Jacksonville.

[File endorsement omitted.]

In United States District Court

[Title omitted.]

Amended præcipe for record

Filed Sept. 18, 1930

The clerk of the above-styled court is hereby requested and directed to prepare and certify a transcript of the record in the above-styled cause, for the use of the United States Circuit Court of Appeals for the Fifth Circuit by including therein the following papers:

1. Bill of subpœna.
2. Chancery subpœna.
3. Answer of defendant.
4. Preliminary injunction.
5. Injunction bond.
6. Motion of defendant for leave to file amended answer.
7. Stipulation as to filing of amended answer.
8. Order allowing filing of amended answer.
9. Amended answer of defendant.
10. Final decree in favor of complainant and making temporary injunction permanent.
11. Notice of appeal.

12. Petition for appeal.
13. Assignment of errors.
14. Prayer for reversal.
15. Order allowing appeal.
16. Præcipe for record.
17. Amended præcipe for record.
18. Motion for an order allowing the withdrawal of the citation from the office of the clerk of the United States Dis-
77 trict Court for the Southern District of Florida for the purpose of the service of said citation and the refiling of the said citation after said service of the same.
19. Order allowing the withdrawal of the citation from the office of the clerk of the United States District Court for the Southern District of Florida for the purpose of the service of said citation and the refiling of the said citation after said service of the same.
20. Motion for an order allowing the withdrawal of the præcipe for record and the amended præcipe for record from the office of the clerk of the United States District Court for the Southern District of Florida, for the purpose of the service of said præcipe for record and amended præcipe for record and the refiling of the said præcipe for record and amended præcipe for record after said service of the same.
21. Order allowing the withdrawal of the præcipe for record and the amended præcipe for record from the office of the clerk of the United States District Court for the Southern District of Florida, for the purpose of the service of said præcipe for record and amended præcipe for record and the refiling of the said præcipe for record and amended præcipe for record after said service of the same.
22. Amended præcipe for record.
23. Notice of præcipe indicating portions of the record to be incorporated into the transcript upon appeal.
24. Statement of evidence.

(Sgd.) WILBURN P. HUGHES,
United States Attorney,

(Sgd.) H. F. MCCONNELL,
Special Attorney, Bureau of Internal Revenue,
Washington, D. C.,

(Sgd.) RAYMOND F. BROWN,
Special Attorney, Bureau of Internal Revenue,
Miami, Fla.,
Attorneys for Peter H. Miller, Individually and as Collector of Internal Revenue for the District of Florida,
Defendant and Plaintiff in Error.

(Indorsed on back as follows:)

Received this writ at Jacksonville, Florida, September 18, 1930, and executed it at Jacksonville, Florida, the same day, by exhibiting this original writ and delivering a true copy hereof to W. E. Nichol-

Q. You are paying a ten-cent tax, of course, on that?

A. Oh, yes.

Q. Has the Higgins Nut Product interfered in that business in any way?

A. Yes, sir.

Q. The Higgins product has interfered with your artificially colored oleomargarine that you are paying a tax on?

A. Yes.

Q. How much would you say it has interfered with that business as a competitor?

A. Well, that is a matter of guesswork. You can't tell what is working on your market, Mr. McConnell. There are a thousand and one conditions.

Q. Have you any idea, from your business, your competitors, how they have eaten in on your business?

A. There are three or four of these products on the market, and they all tend to upset your program. I know that, going out to the trade we would have a customer—licensed customer on colored standard nut margarine, the regular oleomargarine, as we call it; a salesman would come back to me and say, "Well, he has got Penosbscot"; "He has got Higgins"; "He has got Nu-ine"; "Nut-Z-Al"; and "Don't want any of our stuff; too high."

Q. How does the water content of your colored oleomargarine compare with the Southern Nut Product? About the same, isn't it?

A. You get more water in the nut margarine than you will in the nut product, as a rule.

Q. How much water?

A. Probably ten per cent more.

Q. How is the salt content? The same?

A. The salt content is approximately the same.

Q. And they are manufactured in the same way, with the exception of churning one in water and the other in milk?

A. That is correct; and of course, the preservative.

60 Q. Have you ever checked up to find out how many of these other so-called nut-oleomargarine products are on the market here, the same as the Higgins people?

A. Now?

Q. Yes.

A. There are none, to my knowledge, at this time.

Q. Were there ever any others down here?

A. Yes, sir.

Q. Did they ever interfere with your business in any way as a competitor?

A. Yes, sir.

Q. Seriously?

A. Before we defended ourselves with a product of the same nature they interfered with our business seriously.

Q. So that these nut products, then, were interfering with your business of artificially colored oleomargarine?

A. That is correct; also uncolored oleomargarine.
Q. What?
A. Also uncolored oleomargarine.
Q. Uncolored oleomargarine?
A. Yes.
Q. Why was that, do you know? What was the reason for it?
A. Just the same reason, that if we are in a store we will say with uncolored oleomargarine——
Q. Speaking of the colored products.
A. I want to demonstrate this way—and this merchant puts on a big sale on compound lard on Saturday; we do very little business that day. It interferes with our sales. These products did, too. They interfered more particularly with the colored margarine, which was a large per cent of it being used for cooking, because they didn't have to pay this tax. There was interference, to answer your question.
Q. You are voluntarily paying all the tax on these products now?
A. We are told by the revenue department that these products are taxable.
Q. I say, ever since October——
A. I don't say we are voluntarily paying this tax, Mr. McConnell. We are not, because we certainly don't want to pay it.
Q. Well, I mean the Government is not threatening to seize your property, or anything of that kind?
A. Well, there is instructions out that it is taxable.
Q. The Government hasn't threatened to seize your property if the tax isn't paid?
A. They have not. They made this assessment on us and sent a deputy to see us.
Q. And you know the collector has been advised not to seize any property or anything of the kind, don't you, without instructions from Washington?
67 A. The letter that he received had that wording.
Q. To that effect. And you knew the department in Washington were making no move to collect any of this tax until the matter had reached the Supreme Court in the Harrey-Taylor case, did you not? You were advised of that at the conference, by the commissioner in Washington?
A. Oh, I couldn't say that they weren't going to collect any tax.
Q. Wasn't that the purport of the conversation at the time you were in conference with the commissioner in Washington, until this matter was finally determined by the Supreme Court?
A. I have heard so much conversation on this subject——
Q. But you were at the conference in the commissioner's office?
A. I was there in June at the conference.
Q. And you know there has been no instance where the Government has attempted to collect or enforce collection of this tax on any product in the United States?

taxable as oleomargarine. As a result of that decision the then Commissioner of Internal Revenue, with the approval of the then Secretary of the Treasury of the United States, published and promulgated Treasury Decision 3590, which was the text of the above-mentioned decision, and further informed all concerned that Nut-Z-All had been held by the court not to be oleomargarine and not taxable as oleomargarine. On August 20, 1924, the then Deputy Commissioner of Internal Revenue, in the reply to an inquiry made to the then Commissioner of Internal Revenue by the Institute of
83 Margarine Manufacturers, an association of oleomargarine manufacturers, as to the taxability of said product Nut-Z-All, stated:

"The product 'Nut-Z-All' was held by this office taxable as oleomargarine, but the decision was contested in the case of Higgins Manufacturing Company v. Page (297 Fed. 644), wherein this product was held by the court to be not made in imitation or semblance of butter and not taxable as oleomargarine. The court, having held the product to be not taxable as oleomargarine, the fact that retailers advertise and sell it as butter, or as a substitute for butter, would not render them or the manufacturers liable under the internal revenue law."

Notwithstanding the above-mentioned decision in the case of Higgins Manufacturing Company v. Page, the issuance of Treasury Decision 3590 based thereon, and the above-quoted statement contained in the reply to the inquiry of the Institute of Margarine Manufacturers, all of which were given extensive publicity throughout the trade, the then Commissioner of Internal Revenue, with the approval of the then Secretary of the Treasury, endeavored by Treasury Decision 4006, dated April 1, 1927, again to declare products similar to Nut-Z-All taxable as oleomargarine, if colored to look like butter.

In July, 1927, the said Higgins Manufacturing Company filed in the District Court of the United States for the District of Rhode Island a petition for a temporary injunction against Frank A. Page, as collector of internal revenue for the District of Rhode Island, asking the court to restrain the said collector of internal revenue from collecting a tax on Nut-Z-All and similar products as on oleomargarine. The injunction so prayed for was granted on July
84 18, 1927, and at the time of granting said injunction the court rendered an opinion which is reported in Higgins Manufacturing Company v. Page (20 Fed. (2) 948). In July, 1927, the Baltimore Butterine Company, of Baltimore, Maryland, petitioned the Supreme Court of the District of Columbia for a temporary and permanent injunction against the then Commissioner and Deputy Commissioner of Internal Revenue to restrain them from endeavoring to enforce said Treasury Decision 4006 against its nut product, Nu-ine, which was identical in content and appearance with plaintiff's Southern Nut Product, and which was in content and appearance identical with Nut-Z-All. After hearing and due consideration,

that court granted a temporary injunction and rendered an unreported opinion, which stated:

"I agree with the reasoning of the decision of Judge Lowell of the District Court of Rhode Island in Higgins Manufacturing Co. v. Page; that is one of the cases to which the Supreme Court referred in Dodge v. Brady (240 U. S. 122) of extraordinary and exceptional circumstances.

"The bill alleges that the substance 'Nu-ine' involved in this case is the same as 'Nut-Z-All,' which Judge Brown, of the District Court, held not subject to taxation under the oleomargarine act. Yet in spite of this judicial holding the defendant has attempted by a regulation to make all substances like to that involved in this suit taxable under the act. It is clear that the defendant by means of a mere regulation can not enlarge the provisions of the act, and such a regulation can not be enforced. There would be no end to litigation if the defendant should persist in levying a tax after the courts have held the tax invalid, and the injury to the plaintiff would be irreparable and the amount inascertainable."

On December 16, 1927, that court made said injunction
85 permanent. In December, 1927, the United States District Court for the District of Rhode Island made permanent the temporary injunction theretofore granted against said Page as collector of internal revenue for the district of Rhode Island. No appeals were taken from any of the above-mentioned decrees. The plaintiff engaged in the manufacture of its product, Southern Nut Product, after the above-mentioned decisions had been rendered. Before engaging in the manufacture of its said product plaintiff made inquiry of the defendant and in reply to that inquiry received from the defendant a letter which contained the following:

"The Standard Nut Margarine Company has the same privileges of making a compound of the kind in question without taxpaying same as oleomargarine as is being enjoyed by those manufacturers who obtained favorable decisions from the courts."

Prior to the institution of this suit the defendant threatened to collect a tax of ten cents per pound upon plaintiff's Southern Nut Product, as upon the manufacture of artificially colored oleomargarine. In doing so he acted in pursuance of a letter addressed to him by R. M. Estes, Deputy Commissioner of Internal Revenue, which after stating that plaintiff "manufactures a so-called colored cooking compound under the name of 'Southern Nut Product,' which is held to be taxable as colored oleomargarine," and that plaintiff had been assessed the sum of $5,000.00, which covers the tax on
86 50,000 pounds of Southern Nut Product, estimated to have been produced during the month of January, 1929, stated:

"All wholesale and retail dealers in 'Southern Nut Products' and other so-called cooking compounds found on the market in your district should be reported for assessment on subsequent lists unless they hold special tax stamps permitting them to sell colored oleomargarine."

In the manufacture and sale by plaintiff of Southern Nut Product the net profit derived is approximately three cents per pound, and unless immediate relief shall be granted the levy and collection of ten cents per pound tax upon said product heretofore and now being manufactured by plaintiff will render plaintiff insolvent, and in addition make it liable to severe criminal penalties and the forfeiture of its factory and plant in which said product is made, together with all raw materials and manufactured product on hand. The enforecement of the above-mentioned demand of the Deputy Commissioner of Internal Revenue will render hundreds of wholesalers and thousands of retailers who have been and are now handling and selling plaintiff's product liable to said special tax, additional penalties, and severe criminal liabilities. The decree appealed from, which was rendered March 4, 1930, embodied a finding by the court that "the complainant has established the material allegations of the bill of complaint." The transcript contains a statement of evidence which purports to contain the substance of the evidence introduced in the trial of the cause; but documents which were introduced in evidence and were made exhibits, and apparently being mate-
87 rial parts of the evidence, are not set out in the transcript. The record is consistent with the conclusion that the evidence established the material allegations of the bill of complaint.

The following facts, of which we take judicial notic (Jacobs v. United States, 45 Fed. (2) 34) and of which the court below may have taken judicial notice, though no reference to them is found in the record on appeal, have a bearing on questions raised by the record. While this suit was pending in the court below a bill to amend the definition of oleomargarine contained in the oleomargarine act as amended (26 U. S. C. A., §§ 541, 546) was pending in Congress. The report of the Committee on Agriculture of the House of Representatives on that bill stated:

"The purpose of the amendment, in addition to clarifying the language of the act and including the fish oils and fats, as above briefly mentioned, is to bring a third class of fat compounds, in addition to the two specifically enumerated in the existing law, within the definition of oleomargarine and, therefore, within the taxing and regulating power of the Bureau of Internal Revenue. * * *

"These so-called cooking compounds, made in this manner, are not clearly within the definition of oleomargarine as it is stated in the present law, and as this law is interpreted by the courts. * * *

"The evidence before the committee shows that the definition of oleomargarine in the present law is not sufficiently comprehensive to cover the fat and oil compounds that can and are being made to be so nearly like oleomargarine as to mislead the buying public." (Cong. Rec., Feb. 1, 1930, H. R., p. 2996, et seq.)

A Member of the House in advocating the passage of that bill said:

88 "Since the passage of the oleomargarine act there has come into existence in the country a new butter substitute branded

as a cooking compound, but which to all intents and purposes is intended to be and is sold as butter. These new cooking compounds, which we seek to bring within the purview of the oleomargarine law and under its provisions, are made principally of coconut oil, perhaps 80 per cent coconut oil and the balance peanut oil, salt, and water." (Cong. Rec., H. R., Jan. 31, 1930, p. 2907.)

On January 10, 1930, Commissioner of Internal Revenue Lucas wrote a letter to Congress recommending the passage of such a bill, in which he said:

"In view of the injunction granted the Higgins Manufacturing Company, of Providence, R. I., by the District Court of Rhode Island, enjoining the collector from collecting tax on their product manufactured from vegetable oils, salt, water, and artificial coloring, no attempt has been made to assess stamp tax on Higgins Nut Product or to require the payment of special tax by dealers selling the same.

"The Standard Nut Margarine Co., of Jacksonville, Fla., was recently granted a temporary injunction by the United States District Court at Jacksonville, Fla., restraining the collector of internal revenue for this district from the collection of stamp tax upon the manufacture of the plaintiff's Southern Nut Product and from special tax upon its sale at wholesale and retail. It is understood that this case has been set for trial under date of February 24, 1930.

"In all probability numerous other injunction proceedings will be instituted restraining the collection of stamp and special taxes upon the manufacture and sale of these so-called colored cooking compounds, and while the bureau is of the opinion that they are unquestionably made in imitation or semblance of butter and should be subject to the tax imposed under the oleomargarine law, the only satisfactory solution of the problem appears to be through
89 legislation, such as the passage of H. R. 10958, Seventieth Congress, first session, which specifically brings such products within the classification of oleomargarine." (Cong. Rec., H. R., Feby. 1, 1930, p. 2999.)

A letter of the same official to a Senator as to a then pending bill on the subject contained the statement:

"Bill H. R. 6 was drafted to bring these so-called cooking compounds within the definition of oleomargarine as provided in the act of August 2, 1886, as amended by the act of May 9, 1902, and thus avoid the multiplicity of lawsuits and conflicting court decisions with which the Government was threatened in every attempt made to hold such products subject to the oleomargarine law." (Cong. Rec., Senate, May 26, 1930, p. 9930.)

That bill was passed, being approved July 10, 1930. (46 Stat. 1022.) It provided:

"This act shall take effect one year after the date of its enactment."

In May, 1929, the United States District Court for the Southern District of Georgia decided that plaintiff's product, Southern Nut

Product, is not an imitation of butter. (Baltimore Butterine Company v. Talmadge, 32 Fed. (2) 904.) That decision was affirmed by this court prior to the rendition of the decree now under review. (Talmadge v. Baltimore Butterine Co., 37 Fed. (2) 1014.)

The grounds principally relied on in behalf of the defendant to support the contention that the decree under review was erroneous and should be reversed are:

1. That the finding evidenced by the above-mentioned letter
90 addressed to defendant by R. M. Estes, Deputy Commissioner of Internal Revenue, which stated that plaintiff's product, Southern Nut Product, was held to be taxable as colored oleomargarine, and that plaintiff had been assessed the sum of $5,000.00 on that product, was made final and not subject to judicial review by the following provision of section 14 of the oleomargarine act, as amended:

"And such commissioner is authorized to decide what substances, extracts, mixtures, or compounds which may be submitted for his inspection in contested cases are to be taxed under this act; and his decision in matters of taxation under this act shall be final." (24 Stat. 212.)

2. That the maintenance of this suit is forbidden by the statute, which provides that:

"No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." (26 U. S. C. A., § 154.)

3. That this suit is not maintainable, because the Government is an indispensable party to such a suit, and is not a party, or subject to be made a party, thereto.

1. As above indicated, the allegations of the bill and supporting evidence showed the following: The so-called finding, evidenced by the above-mentioned letter of the Deputy Commissioner of Internal Revenue, to the effect that plaintiff's product, Southern Nut Product, is colored oleomargarine, and taxable as such, was made when there was before the official who made that finding no contested case involving the question whether that product was or was not taxable
91 under the law then in force. The way in which that action appears to have been taken persuasively indicates that it was based on an ex parte investigation, without any hearing of which plaintiff was notified, without plaintiff being given an opportunity to present evidence, and without the introduction or consideration of any evidence having a tendency to prove that plaintiff's product is such a one as was covered by the statute then in force. Before that action was taken several courts, as above stated, had decided in contested cases, to which the Commissioner of Internal Revenue, or his subordinate, was a party, that a nut product in content and appearance identical with appellee's product, Southern Nut Product, was not oleomargarine within the meaning of the statute then in force (21 U. S. C. A., § 25) and was not taxable under that statute, and none of those decisions had been brought into question by an appeal therefrom. Before the action of the

Commissioner of Internal Revenue in holding Southern Nut Product to be taxable as colored oleomargarine was proved in the court below in the trial which resulted in the decree now under review, this court had affirmed a decision to the effect that that product is not an imitation of butter. At the time of the admission in the court below of evidence of that action of the Commissioner of Internal Revenue the Congress had before it for consideration a recommendation of that official that the then existing law be so amended as to bring such products within the classification of oleomargarine, the document containing that recommendation showing that that official was of opinion, not that such products were subject to the tax
92 imposed by the law then in existence, but that they should be subject to such tax. At that time pending proceedings in Congress indicated that that body recognized that a change of the then existing law was required to make such products as plaintiff's Southern Nut Product subject to the tax imposed by the oleomargarine act. The evidence persuasively indicated that the action under consideration, whereby plaintiff's product, Southern Nut Product, was held to be taxable as colored oleomargarine, was unsupported by any evidence tending to prove that that product differed in any material respect from products which repeatedly had been judicially determined not to be subject to the tax imposed by the oleomargarine act, or that that product, in any respect was other than the one in the manufacture of which plaintiff engaged after having been informed by the defendant to the effect that it was not subject to that tax. It appeared from the evidence that that action was taken in such circumstance that the basis of it was so unsubstantial as to be frivolous, that it was taken in contemputuous disregard of unappealed from court decisions to the effect that the then existing law imposed no tax on such a product, and amounted to an administrative attempt to coerce the payment of money the exaction of which the official who took that action thought ought to be authorized by law, but which he did not really believe was authorized by the then existing statute as uniformly construed by the courts. The basis of the claim that plaintiff's product was taxable as colored oleomargarine was so unsubstantial as to be frivolous, and the holding that it was so taxable was so arbitrary and capricious that
93 it amounted to a mere administrative fiat, which, in effect, was no decision at all. (Benderup v. Pathe Exchange, 263 U. S. 291, 306; Silberschein v. United States, 266 U. S. 221, 225; Interstate Com. Comm. v. Louisville & Nashville R. Co., 227 U. S. 88, 91.) We conclude that the official action now in question, which purported to hold that plaintiff's product, Southern Nut Product, was taxable as colored oleomargarine, and whereby a so-called tax in the sum of $5,000.00 was attempted to be assessed, was not a decision within the meaning of the above set-out statutory provision, and had no binding or conclusive effect.

2. In several cases in which the Supreme Court of the United States had under consideration the above set-out statute forbidding

the maintenance of any suit for the purpose of restraining the assessment or collection of any tax, that court explicitly recognized that that statute does not prevent an injunction in a case apparently within its terms in which some extraordinary and entirely exceptional circumstances make its provisions inapplicable. (Hill v. Wallace, 259 U. S. 44, 62; Bailey v. George, ib. 16; Dodge v. Brady, 240 U. S. 122, 126.) Though the court's statements to that effect were not necessary for the decision of any of the cases in which they were made, those statements plainly indicate a deliberate conclusion of that court as to the meaning and scope of that statute. In view of that court's expressed conclusion, certainly we would not be warranted in attributing to that statute the meaning or effect of preventing the interference by a court with the enforcement of any attempted exaction by a tax official under the guise of an as-
94 sessed tax, however, extraordinary and entirely exceptional the circumstances may be. That above-mentioned circumstances attending the attempted imposition of the purported tax the enforcement of which was enjoined by the decree appealed were extraordinary and entirely exceptional cannot fairly be denied. The product which was the subject of that threatened exaction, a mixture or compound consisting of cocoanut oil, peanut oil, salt, water, and harmless coloring matter, was not in existence until long after the enactment of the oleomargarine act. It was not made in imitation or semblance of butter, and was not a mixture or compound described in section 2 of that act (26 U. S. C. A., § 541), which covered no mixture or compound containing any vegetable ingredient other than "vegetable oil annatto," which is a dyeing or coloring material used for coloring butter, cheese, etc. Nothing in that statute indicated an intention to tax such a mixture or compound as plaintiff's Southern Nut Product, or that the lawmakers, in enacting that statute, contemplated the possibiliy of such a mixture or compound being devised and coming into competition with butter. Before the so-called tax was attempted to be assessed several courts, in cases to which the Commissioner of Internal Revenue or his subordinate was a party, had decided that products identical in content and appearance with plaintiff's were not subject to the tax attempted to be imposed. The failure to appeal from any of those decisions amounted to an admission by the Commissioner of Internal
95 Revenue that an attempt to impose that tax on such products as plaintiff's Southern Nut Product is not legally sustainable. The claim of the defendant that he was legally authorized to coerce the payment of the so-called tax, when that claim was attempted to be sustained in the trial which resulted in the decree appealed from, was made in such circumstances as to be merely colorable, in effect a frivolous pretense that his action in that regard was in compliance with an official duty imposed by law, that claim then being made after it had been judicially determined several times, in suits to which defendant's official superior or the latter's subordinate was a party, that the statute relied on imposed no tax on products of identically the same kind as plaintiff's Southern Nut Product; after the

defendant had influenced the plaintiff to engage in the manufacture of that product by informing him that it was not taxable under the oleomargarine act; after the defendant's official superior, by failing to have any of the just-mentioned decision appealed from and by recommending to Congress the enactment of a statute imposing a tax on such products, had in effect admitted that those products were not taxable under the then existing law as that law was construed by the courts, and after the lawmakers, by taking steps to impose a tax on those products, had recognized that a change of law was required to make them subject to be taxed. We think it would be a manifest perversion of the statute in question to permit it to be made the means of enabling a tax official to obtain exemption from
96 being restrained from enforcing an exaction which no legislation purports to provide for, and which, in suits to which that official or his official superior was a party, have been judicially determined not to be authorized by law. We conclude that the court, in awarding the injunction complained of, did not, within the meaning of the statue now under consideration, restrain the assessment or collection of any tax. The continued prosecution of the appeal in this case in the circumstances disclosed amounts to an attempt by a tax official to enforce the collection of a tax before, under the law which provides for it, authority to assess or collect that tax is conferred on anyone.

3. The United States is not a necessary party to this suit, the object of which is to restrain threatened illegal conduct of a Federal official violative of rights of the plaintiff. The exemption of the United States from suits does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded or threatened to invade. (Philadelphia Co. v. Stimson, 223 U. S. 605, 619.)

We conclude that in no ground urged is the decree under review erroneous or subject to be reversed.

That decree is affirmed.

97 In United States Circuit Court of Appeals

No. 6049

PETER H. MILLER, INDIVIDUALLY, AND AS COLLECTOR OF INTERNAL REVENUE for the District of Florida

VERSUS

THE STANDARD NUT MARGARINE COMPANY OF FLORIDA, A CORPORATION

Judgment

April 22, 1931

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Florida and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said district court in this cause be, and the same is hereby, affirmed.

98 In United States Circuit Court of Appeals

[Title omitted.]

Order staying mandate

Filed May 19, 1931

On consideration of the application of the appellant in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, it is ordered that the issue of the mandate of this court in said cause be, and the same is, stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, and that due proof of service of notice thereof under paragraph 3 of rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 19th day of May, 1931.

(Signed) RUFUS E. FOSTER,
United States Circuit Judge.

99 [Clerk's certificate to foregoing transcript omitted in printing.]

100 Supreme Court of the United States

Order allowing certiorari

Filed October 19, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Indorsement on cover:] File No. 36065. U. S. Circuit Court of Appeals, Fifth Circuit, term No. 251. Peter H. Miller, individually and as collector of internal revenue for the district of Florida, petitioner, vs. The Standard Nut Margarine Company of Florida. Petition for a writ of certiorari and exhibit thereto. Filed July 22, 1931. File No. 36065.

U. S. GOVERNMENT PRINTING OFFICE: 1931

son, secretary-treasurer of the Standard Nut Margarine Company of Florida, a corporation, making known to him the nature of same.

Fees: $2.00.

C. N. HILDRETH, Jr.,
U. S. S. Marshal,

By (Signed) FRANK A. KOPP, *Deputy.*

78 Further executed this writ at Jacksonville, Florida, September 18, 1930, by exhibiting this original writ and delivering a true copy hereof to E. T. McIlvaine, of the firm of Milam, McIlvaine & Milam, solicitors for the Standard Nut Margarine Company of Florida, a corporation.

Fees: $2.00.

C. N. HILDRETH, Jr.,
U. S. S. Marshal,

By (Signed) W. W. WARD, Jr., *Deputy.*

1844—28—110. Received by U. S. Marshal, So. Dist. of Fla., Sept. 18, 1930, Jacksonville.

[File endorsement omitted.]

[Clerk's certificate to foregoing transcript omitted in printing.]

79 [Minute entry of argument and submission Feb. 23, 1931, omitted in printing.]

80 In United States Circuit Court of Appeals for the Fifth Circuit

No. 6049

PETER H. MILLER, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE for the District of Florida, appellant

VERSUS

THE STANDARD NUT MARGARINE COMPANY OF FLORIDA, A CORPORATION, appellee

APPEAL from the District Court of the United States for the Southern District of Florida

Harrison F. McConnell, special attorney, Bureau of Internal Revenue; Raymond F. Brown, special attorney, Bureau of Internal Revenue, and W. P. Hughes, United States attorney (Harrison F. McConnell, special attorney, Bureau of Internal Revenue, Raymond F. Brown, special attorney, Bureau of Internal Revenue, W. P. Hughes, United States attorney, and C. M. Charest, General Counsel, Bureau of Internal Revenue, on the brief), for appellant.

George N. Murdock, A. Y. Milam, Robt. R. Milam, and E. T. McIlvaine (Geo. N. Murdock, A. Y. Milam, Robt. R. Milam, and E. T. McIlvaine on the brief), for appellee.

Before FOSTER, HUTCHESON, and WALKER, Circuit Judges

Opinion of the court

Filed April 22, 1931

WALKER, Circuit Judge:

This is an appeal from a final decree rendered in a suit
81 brought by the appellee, The Standard Nut Margarine Company of Florida, a corporation, against the appellant, individually and as collector of internal revenue for the District of Florida, under which the appellant was perpetually restrained and enjoined "from collecting or attempting to collect, directly or indirectly, from the plaintiff (the appellee), or any dealer selling plaintiff's product, Southern Nut Product, any pretended tax or imposition purporting to be levied or assessed against the plaintiff or said dealers under the oleomargarine act of August 2, 1896, as amended, on account of the manufacture and sale of the said Southern Nut Product referred to in the petition herein and manufactured by plaintiff." The allegations of appellee's petition or bill, filed December 26, 1926, show as follows, the parties being herein referred to by their designation in the court below: Plaintiff is engaged, and has been engaged for more than two years, in the manufacture and sale in interstate commerce of a nut product known as Southern Nut Product, manufactured and sold under its own distinctive name, said name not being in imitation of the distinctive name of any other product; said name is accompanied on the same label and brand with the name of the place where it is manufactured or produced; and said product contains no added poisonous or deleterious ingredients. Southern Nut Product is a mixture or compound consisting of cocoanut oil, peanut oil, salt, water, and harmless coloring matter, manufactured and sold for cooking, baking, and seasoning purposes. Southern Nut Product is packed and sold only in one-pound cartons,
82 a sample of which was attached to the bill, and plaintiff sells and ships it to a great number of firms and persons located in many States of the United States outside of the State of Florida. Prior to plaintiff engaging in the manufacture and sale of said Southern Nut Product an action at law had been brought against one Page, as collector of internal revenue for the district of Rhode Island, for the purpose of recovering from said collector the amount of taxes paid under protest by the Higgins Manufacturing Company on a product manufactured and sold by that company known as Nut-Z-All, which product was manufactured in the same way and of the same ingredients as Southern Nut Product is manufactured by plaintiff. After hearing the evidence submitted on behalf of both the plaintiff and the defendant in that case, it was held by the court that said product Nut-Z-All was not made in imitation or semblance of butter or intended to be sold as butter or for butter, and hence under the law was not oleomargarine and not

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JUL 22 1931
CHARLES ELMORE CROPLEY
CLERK

No. 251

In the Supreme Court of the United States

OCTOBER TERM, 1931

PETER H. MILLER, INDIVIDUALLY, AND AS COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF FLORIDA, PETITIONER

v.

THE STANDARD NUT MARGARINE COMPANY OF FLORIDA, A CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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In the Supreme Court of the United States

OCTOBER TERM, 1931

No. ——

PETER H. MILLER, INDIVIDUALLY AND AS COLLECTOR of Internal Revenue for the District of Florida, petitioner

v.

THE STANDARD NUT MARGARINE COMPANY OF Florida, a Corporation

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

PETITION

The Solicitor General, on behalf of the petitioner, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit entered in the above-entitled cause on April 22, 1931. (R. 88.)

STATEMENT

The respondent taxpayer is a Florida corporation engaged in the manufacture and sale of a product known as Southern Nut Product, a mixture or

compound of cocoanut oil, peanut oil, salt, water, and harmless coloring matter. (R. 1.) Prior to the commencement of this action the Commissioner of Internal Revenue had decided that this compound was taxable as colored oleomargarine and assessed a tax of $5,000 on 50,000 pounds of the compound estimated to have been produced during the month of January, 1929. (R. 9.) Suit was brought to restrain collection of any of this tax.

The bill of complaint (R. 11) alleges that Southern Nut Product is not oleomargarine as that term is defined in Section 2 of the Act of August 2, 1886, c. 840, 24 Stat. 209 (U. S. C., Title 26, Sec. 541; p. 7, *infra*), and that its taxaton is therefore not justified or authorized by that Act. Petitioner's answer to the bill of complaint alleged that Southern Nut Product is artificially colored oleomargarine and is taxable pursuant to the Act. (R. 32.) The answer also asserted that no injunction should be issued because of the provisions of Section 3224 of the Revised Statutes (*infra,* p. 7), and because the plaintiff had an adequate and complete remedy at law. (R. 32.)

A preliminary injunction was issued by the District Court for the Southern District of Florida. (R. 23.) Thereafter a hearing was held, at which the Collector introduced no testimony, since he contended that Section 3224 of the Revised Statutes prevented the issuing of an injunction. After this hearing the court decided the product was not taxable and the injunction was made permanent by

the final decree. (R. 33.) The petitioner appealed to the United States Circuit Court of Appeals for the Fifth Circuit, which affirmed the District Court.

SPECIFICATION OF ERRORS TO BE URGED

1. The Circuit Court of Appeals erred in holding that an injunction was properly granted notwithstanding the prohibition of Section 3224 of the Revised Statutes.

2. The Circuit Court of Appeals erred in holding that the product of the respondent was not taxable as oleomargarine under the Act of August 2, 1886, c. 840, 24 Stat. 209.

REASONS FOR GRANTING THE WRIT

1. The Commissioner of Internal Revenue has general jurisdiction of the assessment and collection of all taxes imposed by any law providing internal revenue. (R. S., Sec. 321; U. S. C., Title 26, Sec. 2.) The holding of the Circuit Court of Appeals that the Standard Nut Product was not taxable and that therefore the issuing of an injunction did not restrain the assessment or collection of any tax (R. 87) is in conflict with the decisions of this Court as to the applicability of Section 3224 of the Revised Statutes. *State Railroad Tax Cases,* 92 U. S. 575, 613; *Snyder* v. *Marks,* 109 U. S. 189, 192, 193; *Dodge* v. *Osborn,* 240 U. S. 118; *Dodge* v. *Brady,* 240 U. S. 122; *Bailey* v. *George,* 259 U. S. 16; *Graham* v. *duPont,* 262 U. S. 234. Cf. *Smallwood* v. *Gallardo,* 275 U. S. 56.

2. The holding of the Circuit Court of Appeals is in conflict with the decisions of the Circuit Court of Appeals for the Seventh Circuit in *Reinecke* v. *Peacock*, 3 F. (2d) 583, certiorari denied, 268 U. S. 699, reversing a decree enjoining the Collector of Internal Revenue from collecting taxes on the income of a trust distributed prior to assessment, and *Reinecke* v. *O. D. Jennings & Co.*, 16 F. (2d) 927, certiorari denied, 274 U. S. 753, reversing a decree enjoining the collection of a tax on slot machines asserted by the taxpayer not to be included within the definition of the statute. The decision of the Circuit Court of Appeals in this case is also in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Hernandez* v. *McGhee*, 294 Fed. 460, reversing a decree enjoining the collection of income taxes notwithstanding the contention of the taxpayer that he had received no income subject to tax.

3. The Government contends that the courts below erred in holding that the product of the respondent was not oleomargarine within the meaning of the Act of August 2, 1886. The question of the taxability of this product turns largely upon the construction of the Act of August 2, 1886, c. 840, 24 Stat. 209 (p. 7, *infra*). The contention of the Government finds support in *Harrow-Taylor Butter Co.* v. *Crooks* (W. D. Mo.), affirmed, 41 F. (2d) 627 (C. C. A. 8th). See also the discussion of the taxability of this same product in *Standard*

Nut Margarine Company of Florida v. *Jones, Collector* (E. D. S. C.), which decision is not reported but is printed in the Appendix (*infra*, pp. 16–27).

4. Although this Act of August 2, 1886, has been amended by the Act of July 10, 1930, c. 881, 46 Stat. 1022; so that the question of construction of the 1886 Act will not arise in taxes accruing after July 10, 1931, the question involved in the instant case, as applied to the Act of 1886, is one of public interest and of great importance to the Government in the administration of the revenue law. Approximately $2,000,000 in taxes have accrued against this and similar products under the taxing Act here involved. Numerous bills in equity have been filed to enjoin the collection thereof, the final determination of which await the action of this Court in this case.

It is therefore respectfully submitted that a petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit should be granted.

THOMAS D. THACHER,
Solicitor General.

JULY, 1931.

suet, lard, lard-oil, vegetable-oil annotto, and other coloring matter, intestinal fat, and offal fat made in imitation or semblance of butter, or when so made, calculated or intended to be sold as butter or for butter.

STATEMENT

A statement of the facts will be found in the petition, pp. 1–5, *supra.*

ARGUMENT

The Circuit Court of Appeals concluded that the product manufactured and sold by respondent did not come within the statutory definition of taxable oleomargarine and that therefore the injunction awarded did not restrain the collection of a tax. (R. 86.) We submit that in this it erred. As will be hereafter shown, other courts have held that similar products are taxable under the Oleomargarine Act. In this case the Commissioner of Internal Revenue, the officer having general jurisdiction of the subject of assessing and collecting oleomargarine taxes, held that the product was taxable, and under color of his office, through the petitioner Collector, was proceeding to make collection. Under such circumstances this Court has repeatedly held that an injunction should not be granted and that the exclusive remedy is a suit to recover the tax after it is paid. *State Railroad Tax Cases,* 92 U. S. 575, 613; *Snyder* v. *Marks,* 109 U. S. 189, 192, 193; *Dodge* v. *Osborn,* 240 U. S. 118;

Graham v. *duPont*, 262 U. S. 234. Cf. *Smallwood* v. *Gallardo*, 275 U. S. 56. In *Snyder* v. *Marks*, *supra*, this Court said that the word "tax" as used in Section 3224 of the Revised Statutes meant (p. 192)—

> * * * that which is in a condition to be collected as a tax, and is claimed by the proper public officers to be a tax, although on the other side it is alleged to have been erroneously or illegally assessed.

And again (p. 193) that the inhibition of the section—

> * * * applies to all assessments of taxes, made under color of their offices, by internal revenue officers charged with general jurisdiction of the subject of assessing taxes against tobacco manufacturers. The remedy of a suit to recover back the tax after it is paid is provided by statute, and a suit to restrain its collection is forbidden. The remedy so given is exclusive, and no other remedy can be substituted for it.

This principle was again enunciated in *Graham* v. *du Pont*, *supra*, p. 255. Under these decisions the bar of Section 3224 of the Revised Statutes is absolute where the assessment is made by an officer having general jurisdiction over the subject matter and he asserts that the assessment is valid.

The Circuit Court of Appeals in its opinion (R. 86–88) attempts to bring this case within the possible exception to Section 3224 of the Revised Stat-

utes noted by this Court in *Dodge* v. *Osborn, supra,* p. 122, and applied in *Hill* v. *Wallace,* 259 U. S. 44. This Court, however, in *Graham* v. *duPont, supra,* distinguished *Hill* v. *Wallace* by pointing out that the Government had in effect consented to a temporary injunction owing to the peculiar circumstances of that case, and that the case should be classed with *Lipke* v. *Lederer,* 259 U. S. 557, and *Regal Drug Co.* v. *Wardell,* 260 U. S. 386, which were brought to enjoin the collection of penalties in the guise of taxes (pp. 257–258). The instant case does not involve a penalty in the guise of a tax. *McCray* v. *United States,* 195 U. S. 27. The only other case in which this Court has recognized an exception to the application of Section 3224 of the Revised Statutes is *Dodge* v. *Brady,* 240 U. S. 122. The fact justifying the exception, however, was the futility of further litigation of questions which had been considered and adversely disposed of at the same term in *Brushaber* v. *Union Pac. R. R.* 240 U. S. 1.

The decision of the Circuit Court of Appeals that an injunction may properly be issued to enjoin the collection of a tax is in conflict with the decisions of the Circuit Court of Appeals for the Seventh Circuit in *Reinecke* v. *Peacock,* 3 F. (2d) 583, certiorari denied, 268 U. S. 699, reversing a decree enjoining the Collector of Internal Revenue from collecting taxes on the income of a trust distributed prior to assessment, and *Reinecke* v. *O. D. Jennings*

& Co., 16 F. (2d) 927, certiorari denied, 274 U. S. 753, reversing a decree enjoining the collection of a tax on slot machines claimed by the taxpayer not to be included within the definition of the statute. The Circuit Court of Appeals held in each case that even if the tax was not authorized by the statute, if the authorities believed it to be so the collection of the tax might not be enjoined. The decision of the Circuit Court of Appeals in this case is also in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Hernandez* v. *McGhee*, 294 Fed. 460, reversing a decree enjoining the collection of income taxes notwithstanding the contention of taxpayer that he had received no income subject to tax.

The decision of the Circuit Court of Appeals that the Standard Nut Product does not fall within the definition of oleomargarine is also in conflict with the opinion expressed by the Circuit Court of Appeals for the Eighth Circuit in *Harrow-Taylor Butter Co.* v. *Crooks*, 41 F. (2d) 627, in which a product known as Rich Nut Shortening composed of a mixture of the same ingredients as Standard Nut Product, with the exception of a preservative, was considered taxable under the Oleomargarine Act. While this is the only case reaching a Circuit Court of Appeals in which a compound similar to Standard Nut Product was held to be within the

definition of oleomargarine [1] it might be noted that there have been numerous unreported decisions of District Courts of the United States holding that vegetable oil compounds fall within the statute. See also *Standard Nut Margarine Company of Florida* v. *Jones, Collector,* decided by the District Court for the Eastern District of South Carolina November 28, 1930. The opinion is unreported. A copy is attached as an appendix (*infra*, pp. 16–27). The plaintiff in that case and the respondent in this case are the same. No appeal was taken from the decision.

The court below placed great reliance upon the fact that in two other cases Federal courts had issued injunctions against the collection of the oleomargarine tax on products which apparently are similar to the respondent's product. In *Higgins Manufacturing Co.* v. *Page,* 297 Fed. 644, the District Court for the District of Rhode Island, in an action *at law* to which the respondent here was not a party, held that the product then before the court was not taxable and that the taxpayer was entitled to a refund of the tax which it had paid. Several

[1] The court below referred to (R. 84) and seemed to rely upon its own *per curiam* decision in *Talmadge* v. *Baltimore Butterine Co.*, 37 F. (2d) 1014, affirming *Baltimore Butterine Co.* v. *Talmadge*, 32 F. (2d) 904. But that case arose under the Georgia Pure Food law and the sole question was whether the respondent's product was "adulterated or misbranded."

years thereafter the Collector again sought to collect a tax from this same taxpayer, and at the taxpayer's instance this collection was enjoined. *Higgins Manufacturing Co.* v. *Page,* 20 F. (2d) 948. At about the same time the Supreme Court of the District of Columbia in *Baltimore Butterine Co.* v. *Mellon,* unreported, granted a similar injunction, relying almost entirely upon the action which had been taken by the court in Rhode Island.[2]

As has been indicated above, one Circuit Court of Appeals and several District Courts have held that products similar to that involved here are taxable. The mere fact that two lower Federal courts have held that they are not so taxable does not, we submit, afford a sufficient basis for the issuance of an injunction. The very conflict of decisions shows that the question is one in which it can not be said that the Commissioner of Internal Revenue's action is arbitrary or, in the language of the court below (R. 86) "so unsubstantial as to be frivolous." Congress has expressly provided that such dis-

[2] It is true that no appeals were taken from either of these decisions granting injunctions. But an examination of the files in the Department of Justice shows that no appeal was taken in the Rhode Island case because the taxpayer there had previously obtained a judgment at law that its product was not taxable, and that no appeal was taken in the case in the District of Columbia because of the negligence of a subordinate official in failing to file the necessary papers within the time required by statute.

putes shall be settled in an orderly manner by appeals to administrative officials with review at law by the courts. The decision below, in disregarding the plain terms of this statute, is erroneous.

If the decision of the court below affected simply a matter of procedure—namely that determination of the merits of the tax could be had in equity as well as at law—and there had been a proper determination of the question upon the merits, there would be no substantial reason for requiring the taxpayer to start a new suit at law and try out the merits again. But we contend that the court below erred even on the testimony before it, and anyway there was no real trial on the merits. The taxpayer introduced but one witness, whose testimony related to only a few of the material allegations in the plaintiff's bill. The Government introduced no testimony, relying on its motion to dismiss based on Section 3224 of the Revised Statutes.

CONCLUSION

The decision of the court below is in conflict with the applicable decisions of this Court and with the decisions of the Circuit Courts of Appeals for the Seventh and Eighth Circuits. The question involved is of importance in connection with the practical administration of the revenue laws, and particularly with the administration of the Act here involved. It is, therefore, respectfully submitted

that the petition for a writ of certiorari should be granted.

THOMAS D. THACHER,
Solicitor General.
G. A. YOUNGQUIST.
Assistant Attorney General.
CLAUDE R. BRANCH,
SEWALL KEY,
A. H. CONNER,
Special Assistants to the Attorney General.
ERWIN N. GRISWOLD,
Attorney.

JULY, 1931.

APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

In Equity

THE STANDARD NUT MARGARINE COMPANY OF Florida, a Corporation, plaintiff

v.

JOHN F. JONES, INDIVIDUALLY AND AS COLLECTOR OF Internal Revenue for the District of South Carolina, defendant

MEMORANDUM OPINION

The plaintiff gave notice of an application for a restraining order against the defendant. While the notice given would ordinarily be insufficient to enable the defendant to be prepared to oppose the motion, nevertheless the court was of opinion that the importance of the matter demanded further consideration, and issued a restraining order, but set down the hearing of the motion for an interlocutory injunction at as early a date as practicable. The parties have now been heard upon that motion, and in view of the urgency of the matter, I have laid aside, as far as practicable, all other business, and given as much consideration as I could to the questions presented. It will be impracticable to do more than set forth briefly my views in the form of a memorandum opinion.

The plaintiff seeks to enjoin the Collector of Internal Revenue for South Carolina from proceeding in any way to collect a special license tax of $480 a year from wholesalers, and $48 per year from retailers, of its product, Southern Nut Product, assessed under the Oleomargarine Act of August 2, 1886, as amended. The case made is that the plaintiff manufactures Southern Nut Product in Jacksonville, Fla., and has an established business in South Carolina, with numerous wholesale jobbers and retailers who sell the product and are about to be taxed as such sellers on the ground that Southern Nut Product is oleomargarine under the definition of Section 2 of said Act; and that the dealers, for fear of the assessment of the tax, are refusing to handle plaintiff's goods, and its business is about to be destroyed. The contention is that the tax applies only to a product based on animal fats and that plaintiff's product contains only vegetable oils and that several courts have so decided. Plaintiff also contends that its product is not liable to the tax because not calculated or intended to be sold as butter or for butter. The defendant's case is that the definition in Section 2 of the Act properly construed includes imitations of butter made from vegetable oils, and that the Commissioner of Internal Revenue, under Section 14 of the Act, has found that this product is calculated or intended to be sold as or for butter, and has held it to be taxable, and that it is in fact made and sold as a butter substitute. The defendant denies that any court has finally adjudged plaintiff's product to be not taxable. The main contention of the defendant, however, is that Section 3224, R. S. U. S. of 1878

BRIEF IN SUPPORT OF THE PETITION

OPINIONS BELOW

No formal opinion of the District Court for the Southern District of Florida was filed. The court, however, expressed its views at the time of the hearing (R. 46–48, 73) which are otherwise unreported. The opinion of the Circuit Court of Appeals (R. 80–88) is reported in 49 F. (2d) 79.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 22, 1931. (R. 88.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Where the Commissioner of Internal Revenue has determined that a tax is imposed upon a certain product as oleomargarine under the Act of August 2, 1886, c. 840, 24 Stat. 209 (U. S. C., Title 26, Sec. 541), may a suit in equity for the sole purpose of restraining collection be maintained against the Collector of Internal Revenue on the ground that no tax is imposed under a proper construction of the law, despite the prohibition of Section 3224 of the Revised Statutes?

2. Did the courts below err in holding that the product of the respondent was not oleomargarine within the meaning of the Act of August 2, 1886?

STATUTES INVOLVED

Section 3224 of the Revised Statutes (U. S. C., Title 26, Sec. 154) provides:

> No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

Section 267 of the Judicial Code, c. 231, 36 Stat. 1087, 1163 (U. S. C., Title 28, Sec. 384) provides:

> Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law.

The Act of August 2, 1886, c. 840, 24 Stat. 209 (U. S. C., Title 26, Sec. 541), provides in part:

> SEC. 2. That for the purposes of this act certain manufactured substances, certain extracts, and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known and designated as "oleomargarine", namely: All substances heretofore known as oleomargarine, oleo, oleomargarine-oil, butterine, lardine, suine, and neutral; all mixtures and compounds of oleomargarine, oleo, oleomargarine-oil, butterine, lardine, suine, and neutral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow, beef-fat,

(U. S. Code, Title 26, Section 154) prohibits the granting of the injunction; that there is an adequate remedy at law by paying the tax and suing for its recovery; and that the plaintiff has no interest in the proposed tax against the dealers.

The facts of the case as developed before me upon the motion are substantially as follows:

The plaintiff manufactures a product which contains no animal fats whatsoever. It is identical with a product manufactured and sold by Higgins Manufacturing Company of Providence, R. I., known as "Nut-Z-All," which was held in a trial on the facts not to be oleomargarine and not taxable as such. *Higgins Mfg. Co.* v. *Page, Collector,* 297 Fed. 644.

That case was an action at law for the recovery of the tax in question and there was no appeal. The plaintiff, desiring to manufacture a similar product, made inquiry of the Collector of Internal Revenue at Jacksonville, Fla., and the Collector received from the Deputy Commissioner of Internal Revenue a letter, stating in substance that the products referred to were considered by his office as properly taxable, but in view of certain adverse court decisions, that no attempt was being made to hold them taxable at that time. The letter further used the following language:

> Accordingly the Standard Nut Margarine Co. has the same privilege of making a compound of the kind in question without tax-paying the same as oleomargarine as is being enjoyed by those manufacturers who obtained favorable decisions from the courts.

In reliance upon these decisions and the statement of the Commissioner, the plaintiff began the

manufacture of its product, and built up a large and lucrative business in different States, including South Carolina. Some question was made as to whether or not the value of its business in South Carolina exceeded $3,000; but I think the evidence is ample to sustain the contention that the value does exceed that amount, and I so find.

The plaintiff's product is compounded of cocoanut oil, peanut oil, salt, and an artificial coloring matter, and contains, as stated, no animal fats whatsoever. It is colored, and the coloring gives it the appearance of butter. The taste is similar to butter. It is put up in one-pound cartons, and each carton contains four quarter-pound packages. The cartons bear plain statements, in large letters, of the ingredients of the product, and expressly state that it is not sold as a substitute for any other product, but is for cooking, baking, and seasoning. The tissue wrapper on each quarter-pound bears the imprint in large, clear type of the name of the product, with the statement that it is pure, clean, and wholesome, and made from pure cocoanut and peanut oils. There is nothing whatever about the cartons or the wrappers to indicate that the product is intended to be used as butter. The Commissioner, however, has found that the product is actually sold by the retailers as a butter substitute and that the product is calculated or intended to be sold as or for butter.

The first question to be considered is whether or not this court is precluded from issuing an injunction by the terms of Section 3224 R. S., which reads: "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." The defendant contends

that this statute is of universal application, so far as the Federal taxes are concerned, and that where the Commissioner has found the facts and ruled an article to be taxable, such action is final and the courts are precluded from issuing an injunction to restrain the tax. But I am not prepared to accede to the view that the courts are precluded by that section from issuing an injunction in all cases whatsoever. My view is that that section must be given a reasonable construction, and that it is inconceivable that Congress should intend that if the Commissioner should rule that an article clearly beyond the purview of the law should be taxed and the party has no remedy given by the law, he shall be entirely remediless. Such a construction of the Act, vesting in the executive officers of the Government the most absolute power, without redress and without appeal and without resource to the courts, is contrary to the whole spirit of our institutions. My view is that there may be and are exceptional cases which would render that statute inapplicable. I am of opinion that if the Commissioner should rule that an article clearly beyond the purview of the law should be taxed, without any reasonable basis whatever for such ruling, and the party is given no remedy at law, the court would have power to enjoin such arbitrary action. But if there is some reasonable basis for the Commissioner's decision, then I think his decision is final, so far as this remedy is concerned, and Section 3224 would apply, and the party would be entirely remitted to whatever remedy he may have at law. In this view of the case, it will be necessary to consider whether the action of the

Commissioner in holding the article in question taxable was so clearly without reasonable basis as to make his ruling arbitrary.

The plaintiff's first contention is that compounds which contain no animal fats are entirely excluded from the law and therefore its product, being purely a vegetable oil product, is not taxable. If this contention is correct and the statute clearly applies only to compounds of animal fats, then I think an injunction should issue, but it not only does not appear that vegetable oils are excluded from the operation of the Act, but upon the face of the Act, they would appear to be included.

On this point, the Act (24 Stats., p. 209, Sec. 2) reads as follows:

> and all mixtures and compounds of tallow, beef fat, suet, lard, lard-oil, vegetable-oil annotto, and other coloring matter, intestinal fat, and offal fat made in imitation or semblance of butter, or when so made, calculated or intended to be sold as butter or for butter.

The plaintiff contends that in the original engrossed Act and all the printed Acts, the expression "vegetable-oil annotto" is punctuated as appears above; that is, with a dash between "vegetable" and "oil" and no comma between "oil" and "annotto," and that "annotto" (which is a dye) is qualified by the words "vegetable-oil" and means a dye suspended in vegetable oils. In other words, the plaintiff contends that with that punctuation, the expression does not mean vegetable oils *and* annotto, but means "vegetable-oil annotto," a single product, which would exclude vegetable oils from the operation of the Act.

The defendant contends that the proper punctuation is to remove the dash from between "vegetable" and "oil" and place a comma after "oil," so as to make "vegetable oil" one of the forbidden elements of the product and "annotto" another. The defendant also contends that there is no such thing as "vegetable-oil annotto," while the plaintiff contends that there *is* such a substance. It is elementary, of course, that punctuation is a fallible guide and that courts will read Acts of Congress with such punctuation as may be demanded by the context and subject matter. On the face of the Act, the court is of opinion that the proper punctuation would be to place the comma after "oil," so as to bring "vegetable oils" within the purview of the Act. The court has no judicial knowledge as to whether there is such a product as "vegetable-oil annotto" or not, and has been unable to find it mentioned in any work so as to enable the court to take judicial cognizance thereof, nor has any evidence been produced before the court to show that there is such a product. There is a dye called "annotto," whose definition may be found in any standard dictionary. Annotto (or anatta, anatto, annatto, or arnotto, for it is thus variously spelled) is a dye or coloring matter from the seeds of the tree Arnotto. Its colors being fugitive, its chief use is in coloring butter, cheese, and varnish. It appears that the Commissioner, presumably upon ascertaining the facts, has ruled that there is no such substance as "vegetable-oil annotto." It appears to me, therefore, that under the present state of the evidence before me, the proper punctuation would be to place the comma after the word "oil,"

so as to include vegetable oils. Products from such oils are certainly as such within the spirit of the Act as products of animal fats only.

But the plaintiff contends that even if vegetable oil products are included, nevertheless its product is not calculated or intended to be sold as butter or for butter. There is no doubt that the plaintiff has taken every precaution to warn purchasers and consumers that its product is not to be used or sold as a butter substitute. Even the most negligent purchaser ought to be able to know from the cartons and the printing upon the inner wrappers of each quarter-pound section that he is not buying butter or a substitute for butter. But nevertheless it appears that the product looks like butter so as to be indistinguishable to the naked eye; that it tastes like butter; that it is frequently used by many people as butter; that some prefer it; and that dealers do sell it as a substitute for butter. In these circumstances, I am not prepared to say that the Commissioner's ruling that the product is calculated or intended to be sold as butter is so utterly baseless as to be arbitrary and entitle the plaintiff to an injunction, despite the provisions of R. S. Section 3224. I do not think that the words "calculated or intended" in the statute are co-extensive. While the words are synonymous, there is nevertheless a shade of difference in their meaning. It is true that the word "calculated," when used accurately, implies a plan or device, or an intentional adaptation, and a purist in the use of English would perhaps use it only in that sense; but it is frequently, though perhaps inaccurately, used in the sense of "fitted" or "adapted" to a certain end, without regard to intention. Many good writers have so used it. For

example, Washington Irving, whose English is not to be lightly questioned, so uses it; for in The Sketch Book, Rural Life in England, p. 82, he says, "An immense metropolis like London is *calculated* to make men selfish and uninteresting." It is plain that Irving did not mean that such a result had been *intended*. Even though the plaintiff may not have intended its product to be sold as or for butter, nevertheless the Commissioner from the facts might not unreasonably conclude that the product is calculated to be so sold. In brief, the Commissioner's ruling in this respect is not so clearly without reasonable basis as to warrant the court in issuing an injunction in the face of the provisions of R. S. Section 3224. The dealers who are called upon to pay the tax have a remedy provided by law by which they may pay the tax, and sue to recover the same; and I think, therefore, for the reasons stated, that R. S. Section 3224 precludes the court from issuing an injunction under the facts of this case.

But the plaintiff contends that this is one of the exceptional cases in which an injunction may issue and that there is no legal remedy afforded it whatsoever. The point is made that the remedy by suit and recovery of the tax is afforded to the dealer who is taxed, and not to the plaintiff whose business is interferred with, and who is not a party to the tax; that the plaintiff has no legal right to pay the tax for the dealer or to use his name in a suit to recover it, for the dealer may prefer not to involve himself in the controversy; and that since the damage done would be really incapable of computation, if the plaintiff's business were unlawfully destroyed, a case for interference by equitable preven-

tion would exist. The plaintiff relies upon the case of *Hill* v. *Wallace,* 259 U. S. 44, 62. That case does hold that Section 3224 is not of universal application, and that there may be extraordinary and entirely exceptional circumstances which would render an injunction proper in a tax case. See also *Dodge* v. *Osborne,* 240 U. S. 118. But I do not think this case is controlled by the principle laid down in *Hill* v. *Wallace.* There are exceptional cases where the statute does not apply, but I do not think this case is one of them. Congress has seen fit to levy a tax on the dealers in certain articles, and those dealers are given an adequate remedy at law. Now comes the manufacturer, who says that his business will be broken up because the dealers do not choose to pay the tax or to avail themselves of their remedy at law, and that therefore *he* must be granted an injunction. If this is true, then Section 3224 will be practically nullified so far as excise taxes upon the various articles which enter into commerce are concerned. All the various articles which Congress may see fit to tax are manufactured somewhere by some person. If the principle is to prevail that the manufacturer whose tax is not in question may come in and question the tax imposed upon the dealers, it would paralyze the arm of the Government in the collection of excise taxes on any article that is the subject of manufacture and commerce.

It is impracticable, within the limited time at my disposal, to enter into any review of the numerous cases which the plaintiff has cited. I have considered them very carefully, and they are all distinguishable from the present case. Much stress has

been laid upon *Higgins Mfg. Co.* v. *Page,* 20 Fed. (2d) 948; but there the nontaxability of the very subject of litigation had been judicially determined in a suit between the same parties. The effort to tax, notwithstanding the judgment, made a very exceptional case. It is not so in this case, for the only litigation with this plaintiff about its product is still pending on appeal, and has resulted in a final adjudication either way.

Other courts have reached the conclusion that a product similar to that of the plaintiff is taxable or that Section 3224 precludes an injunction. Judge Reeves, in the case of *Harrow-Taylor Butter Co.* v. *Crookes,* reached the conclusion that a product like this was taxable and the Circuit Court of Appeals for the Eighth Circuit, although dismissing the appeal on other grounds, stated that they were of opinion that the trial court was justified in its decision. Judge Sibley in the Northern District of Georgia held that Section 3224 prohibited an injunction in a similar case.

I have been impressed with the view that this is a very hard case for the plaintiff. From the record before me, it appears that the plaintiff acted in good faith in relying upon the letter of the Commissioner. But I do not think that the question was *res adjudicata* or that the Commissioner was estopped from changing his ruling, even if it be deemed a ruling. No tax system has ever yet been devised that will not work hardship sometimes, either in its imposition or method of enforcement. In the present state of the law, parties are compelled to rely in great measure upon the fairness of the executive officers of the Government, and an appeal to Con-

gress. R. S. Section 3224 precludes the court from giving relief. The motion for a preliminary injunction must therefore be denied and the restraining order heretofore granted must be dissolved.

Let the attorneys for the defendant prepare an order in accordance with this memorandum opinion and present the same within ten (10) days from this date to the court for signature, serving a copy thereof upon the attorneys for the plaintiff, with at least four (4) days notice of the time and place when it will be presented.

ERNEST F. COCHRAN,
U. S. District Judge.

CHARLESTON, S. C., *November 28, 1930.*

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No. 251

In the Supreme Court of the United States

OCTOBER TERM, 1931.

PETER H. MILLER, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF FLORIDA, PETITIONER

v.

THE STANDARD NUT MARGARINE COMPANY OF FLORIDA, A CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

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No. 251

PETER H. MILLER, INDIVIDUALLY AND AS COLLECTOR of Internal Revenue for the District of Florida, petitioner

v.

THE STANDARD NUT MARGARINE COMPANY OF Florida, a Corporation

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

No formal opinion of the District Court for the Southern District of Florida was filed. The court, however, expressed its views at the time of the hearing (R. 43–45, 69), which are otherwise unreported. The opinion of the Circuit Court of Appeals (R. 74–83) is reported in 49 F. (2d) 79.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 22, 1931. (R. 83.) The petition for a writ of certiorari was filed July 22, 1931, and was granted October 19, 1931. (R. 84–85.)

QUESTION PRESENTED

Where the Commissioner of Internal Revenue has assessed a tax upon a certain product as oleomargarine under the Act of August 2, 1886, c. 840, 24 Stat. 209 (U. S. C., Title 26, Sec. 541), may a suit in equity for the sole purpose of restraining collection of the tax assessed be maintained against the Collector of Internal Revenue when the real ground of the suit is that the statute, properly construed, does not authorize the assessment of a tax upon the product in question?

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set out in Appendix A, *infra,* pp. 30–35.

STATEMENT

The respondent taxpayer is a Florida corporation engaged in the manufacture and sale of a product known as Southern Nut Product, a mixture or compound of cocoanut oil, peanut oil, salt, water, and harmless coloring matter. (R. 1.) Prior to the commencement of this action the Commissioner of Internal Revenue had decided that this compound was taxable as colored oleomar-

garine and assessed a tax of $5,000 on 50,000 pounds of the compound estimated to have been produced during the month of January, 1929. (R. 9.) Suit was brought to restrain collection of this tax. The bill of complaint alleged (R. 11–12) that Southern Nut Product is composed of vegetable oils and coloring matter and is not oleomargarine as that term is defined in Section 2 of the Act of August 2, 1886, c. 840, 24 Stat. 209 (U. S. C., Title 26, Sec. 541, *infra,* p. 30), and that its taxation is therefore not justified or authorized by that Act. The bill further alleged in substance that, relying upon the decision of the District Court for Rhode Island in *Higgins Manufacturing Company* v. *Page,* 297 Fed. 644, and certain rulings and letters of the Treasury Department which led it to believe that its product would not be held to be subject to tax, respondent commenced the manufacture of Southern Nut Product. (R. 3–8.) The bill also alleged that the Act of August 2, 1886, is unconstitutional for reasons stated in the bill. (R. 12.) It was further alleged that the respondent was without adequate remedy at law for reasons stated in the bill. (R. 10.) Petitioner's amended answer to the bill of complaint contained certain admissions and denials, alleged that Southern Nut Product is artificially colored oleomargarine and is taxable pursuant to the Act (R. 30), and asserted that the court was without jurisdiction to restrain the collection of the tax because of the provisions of Section 3224 of the

3. If there are any exceptions to the application of Section 3224, this case is not within them, and the maintenance of the action is barred by the statute.

ARGUMENT

I

UNDER SECTION 3224 OF THE REVISED STATUTES THE COLLECTION OF A TAX ALLEGED TO HAVE BEEN ERRONEOUSLY ASSESSED MAY NOT BE RESTRAINED

The sole question presented is whether or not the District Court had jurisdiction of this action to restrain the collection of a tax in view of the provisions of Section 3224 of the Revised Statutes. The court below held that Section 3224 does not prevent an injunction in a case apparently within its terms when extraordinary and exceptional circumstances exist which make it inapplicable. It concluded that such circumstances existed in this case. (R. 82-83.)

While the bill of complaint alleged that the Act of August 2, 1886, imposed a penalty in the guise of a tax, there can be no doubt that the petitioner was seeking to collect a tax and not a penalty. *McCray* v. *United States*, 195 U. S. 27. This Court has recently refused to reconsider the question. *Ed. S. Vail Butterine Co.* v. *Reinecke* 49 F. (2d) 1076 (C. C. A. 7th), certiorari denied October 19, 1931 (No. 292, October Term, 1931).

In this case the Commissioner of Internal Revenue, the officer having general jurisdiction of the subject of assessing and collecting oleomargarine taxes, held that the product was taxable, and under color of his office, through the petitioner Collector, demanded payment of the tax. Section 3224 of the Revised Statutes prohibits suits to restrain collection of taxes and the exclusive remedy of a taxpayer who claims the assessment was erroneous or illegal is by a suit to recover the tax after it is paid. *State Railroad Tax Cases,* 92 U. S. 575, 613; *Snyder* v. *Marks,* 109 U. S. 189, 192, 193; *Dodge* v. *Osborn,* 240 U. S. 118; *Graham* v. *duPont,* 262 U. S. 234; *Phillips* v. *Commissioner,* 283 U. S. 589, 595–596. Cf. *Smallwood* v. *Gallardo,* 275 U. S. 56. In *Snyder* v. *Marks, supra,* this Court said (p. 192) that the word "tax" as used in Section 3224 of the Revised Statutes meant—

> * * * that which is in a condition to be collected as a tax, and is claimed by the proper public officers to be a tax, although on the other side it is alleged to have been erroneously or illegally assessed.

And, again (p. 193), that the inhibition of the section—

> * * * applies to all assessments of taxes, made under color of their offices, by internal revenue officers charged with general jurisdiction of the subject of assessing taxes against tobacco manufacturers. The rem-

> edy of a suit to recover back the tax after it is paid is provided by statute, and a suit to restrain its collection is forbidden. The remedy so given is exclusive, and no other remedy can be substituted for it.

A similar declaration was made in *Graham* v. *duPont, supra,* at p. 255.

In the *State Railroad Tax Cases, supra,* the Court referred (p. 613) to the "complete system of corrective justice" which Congress had provided, founded upon administrative appeals with the provision for recovering the tax by action at law after it had been paid. The Court then said (pp. 613–614):

> But there is no place in this system for an application to a court of justice until after the money is paid.
>
> That there might be no misunderstanding of the universality of this principle, it was expressly enacted, in 1867, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." Rev. Stat. sect. 3224. And though this was intended to apply alone to taxes levied by the United States, it shows the sense of Congress of the evils to be feared if courts of justice could, *in any case,* interfere with the process of collecting the taxes on which the government depends for its continued existence. It is a wise policy. It is founded in the simple philosophy derived from the experience of ages, that the payment of taxes has to be enforced by sum-

> mary and stringent means against a reluctant and often adverse sentiment; and to do this successfully, other instrumentalities and other modes of procedure are necessary, than those which belong to courts of justice. (Italics are the Court's.)

This Court has frequently noted the danger inherent in committing to the courts any "general power of impeding or controlling the collection of taxes or relieving the hardship incident to taxation." *Cheatham* v. *United States*, 92 U. S. 85, 89.

Under these decisions Section 3224 of the Revised Statutes is an absolute bar to the maintenance of an action to restrain collection where the assessment is of a tax as distinguished from a penalty in the guise of a tax and is made by an officer having general jurisdiction over the subject matter, who asserts that the assessment is valid.[1]

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[1] Section 3224 has been held to bar suits to restrain collection of taxes under varying circumstances. *Moore* v. *Miller*, 5 App. D. C. 413; appeal dismissed, 163 U. S. 696; *Nichols* v. *Gaston*, 281 Fed. 67 (C. C. A. 1st); *Page* v. *Polk*, 281 Fed. 74 (C. C. A. 1st); *Hernandez* v. *McGhee*, 294 Fed. 460 (C. C. A. 8th); *Bashara* v. *Hopkins*, 295 Fed. 319 (C. C. A. 4th), certiorari denied, 265 U. S. 584; *Cadwalader* v. *Sturgess*, 297 Fed. 73 (C. C. A. 3d), certiorari denied, 265 U. S. 584; *Seaman* v. *Bowers*, 297 Fed. 371 (C. C. A. 2d), affirmed on other grounds, 273 U. S. 346; *Sigman* v. *Reinecke* 297 Fed. 1005 (C. C. A. 7th), certiorari denied, 264 U. S. 597; *Reinecke* v. *Peacock*, 3 F. (2d) 583 (C. C. A. 7th), certiorari denied, 268 U. S. 699, appeal dismissed, 271 U. S. 643; *McDowell* v. *Heiner*, 15 F. (2d) 1015 (C. C. A. 3d), affirming 9 F. (2d) 120, certiorari denied, 273 U. S. 759; *Reinecke* v. *O. D. Jennings & Co.*, 16 F. (2d) 927 (C. C. A.

The true basis of this suit was that petitioner proposed to collect a tax which respondent asserted was erroneously assessed. But Section 3224 expressly prohibits the testing of the validity of an assessment by injunction. In *Snyder* v. *Marks, supra,* at p. 192, this Court pointed out that the word "tax" as used in Section 3224 meant a tax which was alleged to be "erroneously" or "illegally" assessed. In *Dodge* v. *Osborn, supra,* the statute was applied, although it was alleged that the tax there involved was illegal.

The court below held that the respondent's product was not taxable. This conclusion was reached apparently because the court considered that Sec-

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7th), certiorari denied, 274 U. S. 753; *Ralston* v. *Heiner*, 24 F. (2d) 416 (C. C. A. 3d), certiorari denied, 277 U. S. 608; *Ellay Co.* v. *Bowers*, 25 F. (2d) 637 (C. C. A. 2d), certiorari denied, 277 U. S. 606; *Wright & Taylor* v. *Lucas*, 45 F. (2d) 75 (C. C. A. 6th), affirmed, 282 U. S. 409; *Keogh* v. *Neely*, 50 F. (2d) 685 (C. C. A. 7th), appeal dismissed and certiorari denied November 2, 1931 (No. 371, Oct. Term, 1931); *Pullan* v. *Kinsinger*, 2 Abb. 94 (C. C. 6th S. D. Ohio); *Kissinger* v. *Bean*, Fed. Cas. No. 7,853; *Kensett* v. *Stivers*, 10 Fed. 517 (C. C. S. D. N. Y.); *Schulenberg-Boeckeler Lumber Co.* v. *Town of Hayward*, 20 Fed. 422 (C. C. W. D. Wis.); *Straus* v. *Abrast Realty Co.*, 200 Fed. 327 (E. D. N. Y.); *Gouge* v. *Hart*, 250 Fed. 802 (W. D. Va.); dismissed for want of jurisdiction, 251 U. S. 542; *Markle* v. *Kirkendall*, 267 Fed. 498 (M. D. Pa.); *Union Fisherman's Co-op. Packing Co.* v. *Huntley*, 285 Fed. 671 (Ore.); *Black* v. *Rafferty*, 287 Fed. 937 (E. D. N. Y.); *Witherbee* v. *Durey*, 296 Fed. 576 (N. D. N. Y.); *Waldron* v. *Poe*, 1 F. (2d) 932 (W. D. Wash.); *Seaman* v. *Guaranty Trust Co. of New York*, 1 F. (2d) 391 (S. D. N. Y.); *City of Seattle* v. *Poe*, 4 F. (2d) 276 (W.

tion 2 of the Act of August 2, 1886, had no application to products composed of a mixture or compound of vegetable oil (other than "vegetable oil annatto") and also that respondent's product was not made in imitation or semblance of butter so as to be within Section 2. While we contend that the construction of the Act of August 2, 1886, by the court below was erroneous, and that Section 2 applies to compounds or mixtures of vegetable oil, the present record is probably not in proper condition to permit of a final decision as to the taxability of respondent's product, nor is such decision necessary to the disposition of this case. In the trial court the petitioner offered no testimony and relied upon his contention that Section 3224 prohibited the

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D. Wash.); *Staley* v. *Hopkins*, 9 F. (2d) 976 (N. D. Tex.); *Israelite House of David* v. *Holden*, 14 F. (2d) 701 (W. D. Mich.); *Thornhill Wagon Co.* v. *Noel*, 17 F. (2d) 407 (E. D. Va.); *Erie Taxi Co.* v. *Gnichtel*, 17 F. (2d) 661 (N. J.); *French Mortgage & Bond Co.* v. *Woodworth*, 38 F. (2d) 841 (E. D. Mich.); *Stafford Mills* v. *White*, 41 F. (2d) 58 (Mass.).

In the following cases Section 3224 was not applied for various reasons:

In *Frayser* v. *Russell*, Fed. Cas. No. 5,067 (C. C. E. D. Va.), the Collector was exceeding his jurisdiction. Cf. *Nichols* v. *Gaston*, *supra*. In *Lafayette Worsted Co.* v. *Page*, 6 F. (2d) 399 (R. I.), it was held that the Commissioner had no jurisdiction to distrain while an appeal was pending before the Board of Tax Appeals. A contrary view was taken in *Joseph Garneau Co.* v. *Bowers*, 8 F. (2d) 378 (S. D. N. Y.). Cf. *Emaus Silk Co.* v. *McCaughn*, 6 F. (2d) 660 (E. D. Pa.); *Oak Worsted Mills* v. *McCaughn*, 6 F. (2d) 662 (E. D. Pa.). In *Trinacia Real Estate Co.* v. *Clarke*, 34

maintenance of this suit. As the question of whether respondent's product was made in imitation or semblance of butter, or when so made was calculated to be sold as butter or for butter, involves solely a question of fact, and as there has been no real trial on the merits on that issue, it seems unnecessary to refer to the testimony offered on behalf of the plaintiff dealing with that subject. It is proper to say, however, that the testimony so offered indicated that the product was marketed in cartons containing quarter-pound cubes wrapped in vegetable parchment, and that it could be used as a spread and for other purposes for which butter is used. (R. 50, 58–59.) But whether the facts were favorable or adverse to petitioner, the statute forbade the suit and the trial court had no right to determine the validity of the tax.

F. (2d) 325 (N. D. N. Y.), the action of the Collector was obviously arbitrary. In *Long* v. *Rasmussen*, 281 Fed. 236 (Mont.), the complainant whose property was threatened with distraint was a stranger to the tax. In *Mertz* v. *Mellon* (Sup. Ct. D. C.), 6 American Federal Tax Reports, p. 7166 (not otherwise reported), distraint was enjoined because the liability had been extinguished by Section 1106 (a), Revenue Act of 1926 (U. S. C. Sup. IV, Title 26, Sec. 1249). Appeal dismissed as premature, 30 F. (2d) 311 (App. D. C.). The case of *Acklin* v. *People's Sav. Ass'n*, 293 Fed. 392 (N. D. Ohio), was brought by a member against an association and its officers and is classed with the special group of stockholder cases. (*Pollock* v. *Farmers' Loan & Trust Co.*, 158 U. S. 601; *Corbus* v. *Gold Mining Co.*, 187 U. S. 455; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107; *Zonne* v. *Minneapolis Syndicate*, 220 U. S. 187; *Brushaber* v. *Union Pac. R. R.*, 240 U. S. 1; *Stanton* v. *Baltic Mining Co.*, 240 U. S. 103.)

II

THE ASSESSMENT BY THE COMMISSIONER WAS MADE UNDER COLOR OF HIS OFFICE AND WAS NOT ARBITRARY OR CAPRICIOUS

In *Snyder* v. *Marks, supra,* this Court held that Section 3224 applies to all assessments of taxes "made under color of their offices" by internal revenue officers charged with general jurisdiction over particular taxes. It is therefore necessary to determine whether the particular assessment in this case was so made or whether the assessment was so arbitrary and capricious as not to be under color of office.

It is the duty of the Commissioner of Internal Revenue to determine the taxability of a particular product under the Oleomargarine Act. He has general jurisdiction of the assessment and collection of all taxes imposed by any law providing internal revenue. (R. S., Sec. 321, U. S. C., Title 26, Sec. 2.) Under the general supervision of the Commissioner it is the duty of each Collector of Internal Revenue within his collection district to see that all laws and regulations relating to the collection of internal-revenue taxes are faithfully executed and complied with. (R. S., Sec. 3163, U. S. C., Title 26, Sec. 34.) It is the duty of the Collectors to cause their deputies to investigate and make a list of objects in their district liable to pay any tax (R. S., Sec. 3172, U. S. C., Title 26, Sec. 91), and where stamp taxes have not been paid at the time and in the manner provided by law the Commissioner is

required to make the necessary inquiry, determine and assess the taxes thereon, and certify such assessment to the proper Collectors, who are in turn required to proceed to collect and account for the taxes so certified (R. S., Sec. 3182, U. S. C., Title 26, Sec. 102). These general provisions of the statute are applicable to the taxes under the Oleomargarine Act. *United States* v. *Barnes,* 222 U. S. 513, 518. The Oleomargarine Act itself, however, specifically makes it the duty of the Commissioner within two years after the sale or removal of oleomargarine upon which the tax has not been paid to estimate the amount of tax, to assess the same, and certify the same to the Collector. (Act of August 2, 1886, c. 840, Section 9, 24 Stat. 209, 211; U. S. C., Title 26, Sec. 547.) It was pursuant to this statute that the Commissioner proceeded in this case (R. 9), and his determination was *prima facie* correct. *Reinecke* v. *Spalding,* 280 U. S. 227, 232; *Niles Bement Pond Co.* v. *United States,* 281 U. S. 357, 361; *Burnet* v. *Houston,* 283 U. S. 223, 227. The determination of the Commissioner as to the taxability of respondent's product, therefore, was made under color of his office.

His determination was not arbitrary or capricious. Under Section 2 of the Oleomargarine Act, before a product may be designated as oleomargarine and subject to tax as such, it must be manufactured from the ingredients named in the statute or some of them, and be made in imitation or semblance of butter, or, when so made, be calculated or intended to be sold as butter or for butter. The

decision of the court below in this case is the first and only one to hold that vegetable oils were not included among the ingredients named in Section 2 of the statute. The earlier cases turned upon the question whether the particular product under consideration was made "in imitation or semblance of butter, or, when so made, calculated or intended to be sold as butter or for butter." *Higgins Mfg. Co.* v. *Page,* 297 Fed. 644 (R. I.), 650; *Higgins Mfg. Co.* v. *Page,* 20 F. (2d) 948 (R. I.); *Baltimore Butterine Co.* v. *Mellon* (Sup. Ct. D. C.), 1 Prentice-Hall Federal Tax Service, 1927, p. 1872 (not otherwise reported).[2]

Whether a particular product is made in imitation or semblance of butter, or calculated or intended to be sold as or for such, is a question of fact as to which juries, courts, and administrative officials might reasonably differ. An analysis of the various cases dealing with products similar to the one involved in this case is contained in Appendix B, *infra,* pp. 36–39.[3]

It appears from these cases that when the question of the taxability of the same or similar prod-

[2] No appeals were taken from either of the latter two decisions granting injunctions. An examination of the files in the Department of Justice shows that no appeal was taken in the Rhode Island case because the taxpayer there had previously obtained a judgment at law that its product was not taxable, and no appeal was taken in the case in the District of Columbia because of the failure of a subordinate official to file the necessary papers within the time required by statute.

[3] This analysis discloses that with the exception of the two *Higgins* and the *Baltimore Butterine* cases above re-

Revised Statutes (*infra*, p. 30), and because the plaintiff had an adequate and complete remedy at law. (R. 31.)

A preliminary injunction was issued by the District Court for the Southern District of Florida. (R. 23.) Thereafter a hearing was held, at which the Collector introduced no testimony, since he contended that Section 3224 of the Revised Statutes prevented the issuing of an injunction. It is unnecessary for the purpose of this case to set forth the evidence. After this hearing the court made the injunction permanent by the final decree which adjudged that the equities of the cause were with the complainant (respondent here) and against the defendant (petitioner here), and that the complainant had established the material allegations of the bill of complaint. (R. 31–32.) The petitioner appealed to the Circuit Court of Appeals for the Fifth Circuit, which affirmed the District Court. (R. 83–84.)

SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred in holding that an injunction was properly granted notwithstanding the prohibition of Section 3224 of the Revised Statutes.

SUMMARY OF ARGUMENT

The Commissioner of Internal Revenue, the officer having general jurisdiction of assessing and collecting oleomargarine taxes, held that the prod-

uct here involved was taxable, and under color of his office, through the petitioner Collector, was proceeding to make the collection. This Court has repeatedly held that injunction may not be granted in such a case. The bar of Section 3224 of the Revised Statutes is absolute where the assessment is of a tax as distinguished from a penalty in the guise of a tax, provided the assessment is made by an officer having general jurisdiction over the subject matter and he asserts that the assessment is valid. If the tax is erroneous the exclusive remedy is a suit for its recovery after payment. This Court has held that the oleomargarine tax is a tax and not a penalty. The respondent's product was subject to tax, but there was no real trial on the merits and the record is, therefore, incomplete and a decision of that question is unnecessary in this case.

2. Whether a particular product is made in imitation or semblance of butter, or calculated or intended to be sold as or for such, is a question of fact as to which juries, courts, and administrative officials might reasonably differ. The duty of determining such fact is laid primarily upon the Commissioner. If he determines the product to be taxable it is his duty under the Oleomargaine Act to assess the taxes and certify the assessment to the Collector. The assessment in this case was under color of his office, and it was not arbitrary or capricious.

this one unfavorable decision could not bind the petitioner so as to justify a restraint against the performance of his duties in connection with other products.

The bill of complaint alleged that respondent's product was a mixture or compound composed of various vegetable oils and other substances. (R. 1.) The testimony showed that respondent's product was marketed in one-pound cartons containing four cubes of four ounces each, each quarter-pound print being wrapped in vegetable parchment. (R. 50.) Accordingly the record shows that the product upon which tax was assessed was composed of vegetable oils and was packed in a manner somewhat similar to the manner in which butter is packed for retail sale. As the Commissioner construed the Oleomargarine Act as applying to mixtures or compounds of vegetable oils, and as there was a basis for his conclusion that the respondent's product was made in imitation or semblance of butter, it is obvious that his action in assessing the tax was not arbitrary or capricious.

Since each product must be dealt with separately, and since it was the duty of petitioner to assess and collect a tax if he concluded that it was due—and there is ample support for his conclusion that respondents' and similar products were taxable—it is entirely clear that the action of the Commissioner and petitioner was not arbitrary, nor, in the lan-

guage of the court below (R. 81), "so unsubstantial as to be frivolous."[5]

III

IF THERE IS ANY EXCEPTION TO THE APPLICATION OF SECTION 3224 OF THE REVISED STATUTES; THIS CASE IS NOT WITHIN IT

Section 3224 of the Revised Statutes contains no exception and seems to apply to every suit to restrain the collection of a tax, assessed by revenue officers having general jurisdiction over the assessment of the particular taxes, who are acting under color of their offices. While this explicit language would seem to admit of no exception, the possibility that there may be exceptions under extraordinary circumstances has been referred to in several decisions of this Court.

In *Dodge* v. *Osborn, supra,* a bill had been filed to enjoin assessment and collection of income taxes and the bill alleged that the statute under which the taxes were assessed was unconstitutional, that unless an injunction was granted many suits by other persons would be brought for the recovery of taxes and that the assessment of the taxes would

[5] In holding that the action of the Commissioner was arbitrary the court below also seemed to rely upon its conclusion that the Commissioner had influenced respondent to engage in the manufacture of its product by indicating that he had no present intention to attempt to assess a tax on it. (R. 83.) This is based upon a letter written to respondent in response to its request. The letter is not in the record, but extracts from it (R. 8, 60) do not support the court's view. It is immaterial, however, for the Commissioner had the right to change his mind. *Burnet* v. *Porter*, 283 U. S. 230; *Sweets Co. of America* v. *Commissioner*, 40 F. (2d) 436 (C. C. A. 2d).

constitute a cloud on plaintiff's title. This Court held that Section 3224 of the Revised Statutes applied and affirmed a judgment dismissing the complaint for want of jurisdiction. It was contended on behalf of the plaintiffs that equities sufficient to sustain jurisdiction were alleged and that accordingly the case fell within an exception to the application of the statute. The Court did not concede the correctness of this contention but, accepting it merely for the purpose of the argument, held that the allegations were wholly inadequate to sustain jurisdiction. The Court said, at page 122:

> * * * it is obvious that the statute plainly forbids the enjoining of a tax unless by some extraordinary and entirely exceptional circumstances its provision are not applicable.

In *Hill* v. *Wallace,* 259 U. S. 44, this Court considered a bill filed by members of the Chicago Board of Trade against the Board of Trade and its officers, the Commissioner of Internal Revenue and others, attacking the validity of the Future Trading Act imposing a tax on contracts for the sale of grain for future delivery. Although a motion to dismiss the bill had been made in the District Court on behalf of the United States Attorney and the Collector of Internal Revenue on the ground that the suit was to restrain the collection of a tax and was barred by Section 3224 of the Revised Statutes, the case was argued in this Court by the Solicitor General upon the merits. Dealing with

the contention that suit was barred by Section 3224, the Court said, at p. 62:

> We think these exceptional and extraordinary circumstances with respect to the operation of this act make Section 3224 inapplicable.

The circumstances mentioned were that the sale of grain without paying the tax would subject a dealer to heavy criminal penalties; that to pay a heavy tax on each of many daily transactions and then sue to recover it back would necessitate a multiplicity of suits and be impracticable; and that for the Board of Trade to refuse to apply for designation as a contract market in order to test the validity of the Act would stop the dealings of its members in a branch of the business most important to themselves and to the country.

In *Graham* v. *DuPont, supra,* a bill of complaint was filed to restrain the collection of a tax alleged to be barred by the statute of limitations. The court reversed a decree for the plaintiff and directed dismissal of the bill, distinguishing *Hill* v. *Wallace, supra,* as follows:

> * * * *Hill* v. *Wallace,* 259 U. S. 44, was in part a suit like the foregoing. It was a bill filed by members of the Chicago Board of Trade to prevent the governing board from applying to the Secretary of Agriculture to have the Board of Trade designated as a "contract market" under the Future Trading Act on the ground that the act was

unconstitutional and its operation would impair the value of the Board to its members. Without such designation, no member could have sold grain for future delivery without paying a prohibitive tax, and if he sold without paying the tax, he was subjected to heavy criminal penalties. To pay such a tax on each of the many thousands of transactions on the Board, and to sue to recover them back would have been utterly impracticable. It would have blocked the entire future grain business of the country and would have seriously injured not only the members of the Board but also the producing and consuming public. This phase of the situation was so clear that the Government in effect consented to the temporary injunction. See *Hill* v. *Wallace,* 257 U. S. 310, s. c. 615. Under these extraordinary and most exceptional circumstances, it was held that Section 3224 was not applicable to prevent an injunction against collection of such a prohibitive tax imposed for the purpose of regulating the future grain business with all the unnecessary and disastrous consequences its enforcement would entail if the act was unconstitutional. *Hill* v. *Wallace* should, in fact, be classed with *Lipke* v. *Lederer, supra* [259 U. S. 557], as a penalty in the form of a tax.

To these cases must be added *Bailey* v. *George,* 259 U. S. 16, in which this Court directed the dismissal of a bill brought to enjoin a levy and sale of property for a penalty in the guise of a tax under

the Child Labor Law, which on the same day had been decided to be unconstitutional in the *Child Labor Tax Case,* 259 U. S. 20. While the bill was dismissed, it was intimated that if the complainants had alleged facts which would have prevented them from availing themselves of their remedy at law the bill might have been entertained.[6]

In the *State Railroad Tax Cases, supra,* this Court pointed out that a clear case for equitable relief would be required before it would sustain an injunction against the collection of a State tax, and based its conclusion upon the policy disclosed by Section 3224 of the Revised Statutes, to limit the courts from interfering with the process of collecting taxes in any case.

This Court has never defined the exceptional circumstances, if any, which would justify disregarding the express prohibition contained in Sec-

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[6] *Dodge* v. *Brady*, 240 U. S. 122, is not to be classed as an exception to the application of Section 3224. It was a companion case to *Dodge* v. *Osborn*, *supra*, and was originally brought to enjoin the collection of income surtaxes. Upon the denial of a preliminary injunction the taxes were paid and a supplemental bill filed praying for their recovery which failed to allege the necessary prerequisite of an application for refund. The court below dismissed the bill on the merits. This Court recognized the applicability of Section 3224 to the original bill, but owing to the futility of further litigation of questions which had been considered and disposed of at the same term in *Brushaber* v. *Union Pac. R. R.*, 240 U. S. 1, it affirmed the judgment of the court below notwithstanding the jurisdictional defect in the supplemental bill.

tion 3224, nor is there occasion for such definition here, for when the circumstances upon which the respondent relies to escape the bar of the statute are examined it is apparent that the statute must be applied.

The "exceptional circumstances" upon which the respondent apparently relies to escape the bar of Section 3224 of the Revised Statutes are: (1) That in *Higgins Manufacturing Company* v. *Page*, 297 Fed. 644, the District Court for Rhode Island decided a case involving a similar product adversely to the Government, and that no appeal was taken; (2) that the Commissioner at one time indicated that he had no present intention of assessing a tax on respondent's product; (3) the allegation in the bill of complaint that the statute under which the tax was assessed was unconstitutional; (4) that to pay the tax and litigate the question of the validity of the assessment at law would be injurious to respondent's business, and accordingly that respondent had no adequate remedy at law.

We have already dealt with the claim that *Higgins Manufacturing Company* v. *Page, supra,* was binding upon this petitioner. That case involved a different product having different attributes. It is clear that that decision did not constitute a former adjudication by which the petitioner was bound, nor did that decision relieve respondent's product from tax upon any other theory.

The record does not show, as the court below held (R. 82–83), that the petitioner had induced the

respondent to engage in the manufacture of its product by informing it that it was not taxable under the Oleomargarine Act. While apparently the respondent was advised at one time that the Commissioner then had no present intention of assessing a tax on its product, this did not prevent the Commissioner and the petitioner from assessing a tax later, if they then concluded that it was their duty to do so. *Burnet* v. *Porter, supra; Sweets Co. of America* v. *Commissioner, supra.* The fact that respondent embarked on manufacture in the hope that no tax would be assessed and with some basis for that hope could not estop the Government or its officers from assessing and collecting taxes due.

The claim of unconstitutionality was without foundation. *McCray* v. *United States, supra.* Nor can such a claim remove the statutory prohibition against the suit. *Dodge* v. *Osborn, supra,* at p. 121.

The mere allegation of facts to support the allegation that the respondent had no adequate remedy at law did not present an exceptional circumstance justifying the granting of a prohibited injunction. Even in the absence of the prohibitory statute, no injunction could be granted in any case without the allegation of the necessary facts to confer equity jurisdiction. But the statute prohibits the exercise of that jurisdiction, even when such facts are alleged.

The facts which respondent alleged to support its assertion, that it was without an adequate remedy at law, in addition to those already mentioned, were in substance that a tax of ten cents a pound upon the product which the respondent had already manufactured would amount to such an enormous amount that it would be impossible for respondent to pay the same and sue to recover. (R. 10.) The assessment involved in this case was $5,000, and there was no proof that the respondent was not able to pay this sum. There was no proof that any attempt had been made to distrain respondent's property, or to assess and collect other taxes in addition to the $5,000 assessed for the month of January, 1929. The record shows that respondent and other manufacturers had submitted offers of compromise for a nominal sum of the taxes assessed pursuant to agreement with the Commissioner and that pending action thereon respondent continued to manufacture its product. (R. 64–65.)

A further reason alleged in the bill for the inadequacy of the remedy at law was that the respondent was suffering immediate and irreparable injury and loss of property rights (R. 10), and this allegation was apparently based upon the further allegation that dealers and agents of the respondent, fearing the taxes and penalties demanded by the petitioner, had ceased their purchase of respondent's product, canceling existing orders and substituting other products, and that unless relief was

granted the business of the respondent would be destroyed. Some testimony was offered by the respondent indicating that the assessment of the tax had affected respondent's business. (R. 54–55.) The testimony indicated, however, that there might have been other reasons for the decline in the sale of respondent's product. (R. 57–58, 62.) We submit that these allegations and the proof offered in support thereof were entirely insufficient to justify the District Court in entertaining jurisdiction of the suit for injunction, and were in no sense extraordinary and exceptional circumstances. They were the usual circumstances attending a business enterprise, conducting a competitive business in an article subject to tax which had previously escaped taxation. Of course the payment of a tax on such an article would be inconvenient, and might result in some confusion in the enterprise, but that did not justify the granting of an injunction which was prohibited by statute; nor did the circumstances show the absolute necessity for equity interference. See *Corbus* v. *Gold Mining Company,* 187 U. S. 454.

There were, to quote respondent's witness, "a thousand and one conditions" affecting the market (R. 62); and it is quite as consistent with the testimony that the decline in respondent's business was due to the general economic depression (the presence of which the courts will judicially notice, *Lincoln Gas Co.* v. *Lincoln,* 250

ucts has been considered in actions at law the Government has prevailed, except in the first *Higgins* case, *supra*. The District Court for the Western District of Missouri held a similar product to be taxable. *Harrow-Taylor Butter Co.* v. *Crooks*,

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ferred to injunctions were granted in two cases. One, decided in 1930 and now on appeal to the Court of Appeals of the District of Columbia, involved the Higgins product which had been considered in the earlier cases (*Higgins Mfg. Co.* v. *Burnet* (Sup. Ct. D. C.), not reported). In the other, a preliminary injunction was issued at the instance of this respondent after the decision of the District Court in this case, the proceedings being suspended until the decision in the instant case (*Standard Nut Margarine Co.* v. *Burnet* (Sup. Ct. D. C.) not reported). In conflict with the foregoing, injunctions were denied in three cases. (*Harrow-Taylor Butter Co.* v. *Mellon* (Sup. Ct. D. C.), not reported; *Ed S. Vail Butterine Co., Standard Nut Margarine Co., and seven others*, v. *Blair* (Sup. Ct. D. C.), not reported; *Filbert-Kuhlemann Co.* v. *Tait* (Md.), 1 Prentice-Hall Federal Tax Service, 1931, p. 247, not otherwise reported.)

Although the Commissioner was of the opinion that respondent's and similar vegetable oil products were properly taxable under Section 2 of the Act of August 2, 1886, *infra*, Appendix A, pp. 30–35, the injunction granted in the *Higgins* case in Rhode Island, and the granting of the temporary injunction in this case led him to recommend to Congress the amendment of the section as the most satisfactory solution of the problem in order to avoid a multiplicity of suits and further conflicting court decisions. (R. 79.) The section was accordingly amended by the Act of July 10, 1930, c. 881, 46 Stat. 1022, *infra*, Appendix A, pp. 31–32. The amended section clearly includes vegetable oil compounds churned in water and containing a moisture content in excess of one per centum or common salt. The legislative history of this amendment is set forth in the opinion of the court below (R. 78–80). As it has no immediate relevancy to the questions now presented it seems unnecessary to discuss it herein.

not reported (opinion contained in Appendix C, *infra*, pp. 39–44). Its judgment was affirmed by the Circuit Court of Appeals for the Eighth Circuit (41 F. (2d) 627). The District Court for the Eastern District of South Carolina held the identical product involved in this case to be taxable in a case in which this respondent was the plaintiff. (*Standard Nut Margarine Co.* v. *Jones*, not reported; the opinion is printed as an appendix to the petition for certiorari in this case, pp. 16–27.) No appeal was taken. The decision in the first *Higgins* case, *supra*, was placed squarely on the ground that the product there involved was not made in imitation or semblance of butter or calculated or intended to be sold as or for butter. The product there involved was marketed in a form different from respondent's product (see 297 Fed. 644, 648). Respondent's bill of complaint referred to that decision as binding upon petitioner in determining whether other and different products were subject to tax and the court below seems to have based its decision in part upon the failure of the Commissioner to appeal from that decision.* It is clear, however, that each product must be judged on its own content, form, and other attributes, and that

*The court below referred (R. 79–80) to its own *per curiam* decision in *Talmadge* v. *Baltimore Butterine Co.*, 37 F. (2d) 1014, affirming *Baltimore Butterine Co.* v. *Talmadge*, 32 F. (2d) 904. That case arose under the Food and Drugs Act of Georgia and while the District Court inferentially held that respondent's product was not intended to be an imitation of butter the sole question was whether it was "adulterated or misbranded."

APPENDIX A

STATUTES AND REGULATIONS INVOLVED

Section 3224 of the Revised Statutes (U. S. C., Title 26, Sec. 154) provides:

> No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

Section 267 of the Judicial Code, c. 231, 36 Stat. 1087, 1163 (U. S. C., Title 28, Sec. 384) provides:

> Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law.

The Act of August 2, 1886, c. 840, 24 Stat. 209, provides in part:

> SEC. 2. That for the purposes of this act certain manufactured substances, certain extracts, and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known and designated as "oleomargarine," namely: All substances heretofore known as oleomargarine, oleo, oleomargarine-oil, butterine, lardine, suine, and neutral; all mixtures and compounds of oleomargarine, oleo, oleomargarine-oil, butterine, lardine, suine and neutral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow, beef-fat, suet, lard, lard-oil, vegetable-oil annotto, and other coloring matter, intestinal fat, and offal fat made in imitation or semblance of

butter, or when so made, calculated or intended to be sold as butter or for butter. (U. S. C., Title 26, Sec. 541.)

SEC. 9. That whenever any manufacturer of oleomargarine sells, or removes for sale or consumption, any oleomargarine upon which the tax is required to be paid by stamps, without the use of the proper stamps, it shall be the duty of the Commissioner of Internal Revenue, within a period of not more than two years after such sale or removal, upon satisfactory proof, to estimate the amount of tax which has been omitted to be paid, and to make an assessment therefor and certify the same to the collector. The tax so assessed shall be in addition to the penalties imposed by law for such sale or removal. (U. S. C., Title 26, Sec. 547.)

Act of July 10, 1930, c. 881, 46 Stat. 1022 (U. S. C. Sup. IV, Title 26, Sec. 541):

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2 of the Act entitled "An Act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine," approved August 2, 1886, as amended, is amended to read as follows:

"SEC. 2. That for the purposes of this Act certain manufactured substances, certain extracts, and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known and designated as 'oleomargarine,' namely: All substances heretofore known as oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and neutral; all mixtures and compounds of oleomargarine, oleo, oleomargarine oil, but-

terine, lardine, suine, and neutral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow, beef fat, suet, lard, lard oil, fish oil, or fish fat, vegetable oil, annatto, and other coloring matter, intestinal fat, and offal fat;—if (1) made in imitation or semblance of butter, or (2) calculated or intended to be sold as butter or for butter, or (3) churned, emulsified, or mixed in cream, milk, water, or other liquid, and containing moisture in excess of 1 per centum or common salt. This section shall not apply to puff-pastry shortening not churned or emulsified in milk or cream, and having a melting point of one hundred and eighteen degrees Fahrenheit or more, nor to any of the following containing condiments and spices: salad dressings, mayonnaise dressings, or mayonnaise products nor to liquid emulsion, pharmaceutical preparations, oil meals, liquid preservatives, illuminating oils, cleansing compounds, or flavoring compounds."

SEC. 2. This Act shall take effect twelve months after the date of its enactment.

Approved, July 10, 1930.

Treasury Regulations 9 relating to taxes on oleomargarine, etc. (Revised August, 1925):

SEC. 40. *Substances, etc., taxable as oleomargarine—Commissioner's decision final.*—(*a*) When any substance declared by any collector of internal revenue to be oleomargarine and liable to tax is claimed by the owner to be butter or some other substance not liable to tax, the collector will submit a sample of the article for the decision of the Commissioner of Internal Revenue, under whose direction it will be

subjected to tests to determine its character. Each such sample must weigh not less than one pound, and must be taken in the presence of an internal revenue officer. In case search is to be made for unusual coloring matter in oleomargarine, at least 2 pounds should be sent. (For more specific instructions relative to sampling, see sec. 112.) The Commissioner's decision as to any substance will not afford any indication as to what his decision will be as to another substance, although such other substance may be similarly marked and labeled. If the decision of the Commissioner, when rendered, is favorable to the claimant, the collector will be directed to release the goods. If the Commissioner's decision sustains the collector, forfeiture proceeding will be instituted.

(*b*) *Cooking compounds or substitutes for lard; when taxable.*—All animal fats or oils, vegetable oils, and all compounds and mixtures of such animal fats or oils and vegetable oils, with or without the addition of coloring matter, which have been churned in cream, milk, or water, or bathed in a solution of brine, thereby imparting to the resultant product the flavor, texture, and appearance of butter, are properly taxable under the law as oleomargarine. Cooking compounds or substitutes for lard which are placed on the market in good faith as such and which do not resemble butter in general characteristics are exempt from tax as oleomargarine. (T. D.'s 1354, 1434.)

Treasury Decision 4006 (C. B. VI–1, pp. 333–334):

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF
INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

Paragraph (b) of section 40, Regulations 9 (revised August, 1925), relative to the tax on oleomargarine and other substances, is hereby amended to read as follows:

(b) Cooking compounds: Cooking compounds which are placed on the market in good faith as such, and which do not resemble butter in flavor, texture, or appearance, are exempt from the tax imposed upon oleomargarine.

All animal fats or oils, vegetable oils, and all compounds and mixtures of such animal fats or oils, or vegetable oils, with or without the addition of coloring matter, which have been churned in milk or cream with the effect of causing the resultant product to assume a flavor, texture, and appearance resembling that of butter, are properly taxable under the law as oleomargarine.

All vegetable or animal oils or combinations thereof, churned, emulsified, or however mixed, colored to look like butter, crystalized, salted (or unsalted), and worked, will be deemed to possess a sufficient similarity to butter in flavor, texture, and appearance to bring the resultant product within the classification of oleomargarine.

All compounds referred to above as being taxable as oleomargarine which are found on the market on and after the effective date

of this Treasury decision will be held subject to the tax.

The provisions of this Treasury decision will take effect six months after the date of approval, and all rulings inconsistent therewith are hereby revoked as of that date.

D. H. BLAIR,
Commissioner of Internal Revenue.

Approved April 1, 1927.

OGDEN L. MILLS,
Acting Secretary of the Treasury.

(The effective date of T. D. 4006 was extended to July 1, 1928, by T. D. 4085, C. B. VI-2, p. 381, and T. D. 4114, C. B. VII-1, pp. 334-335. It was revoked, however, April 13, 1928, by T. D. 4149, C. B. VII-1, p. 334.)

APPENDIX B

CASES INVOLVING TAXABILITY OF VEGETABLE OIL COMPOUNDS SIMILAR TO PRODUCT INVOLVED IN THIS CASE

1924—*Higgins Mfg. Co.* v. *Page* (R. I.), 297 Fed. 644. Action at law to recover tax paid under protest on a product composed of vegetable oils. The product was held "not made in imitation or semblance of butter, or, when so made, calculated or intended to be sold as butter or for butter." Judgment for plaintiff.

1927—*Higgins Mfg. Co.* v. *Page* (R. I.), 20 F. (2d) 948. In Equity. Injunction granted to restrain the collection of tax on the same product considered in the foregoing case.

1927—*Baltimore Butterine Co.* v. *Mellon* (Sup. Ct. D. C.), 1 Prentice-Hall Federal Tax Service, 1927, p. 1872 (not otherwise reported). Bill to enjoin collection of tax. The Treasury Department had promulgated T. D. 4006, C. B. VI–1, p. 333 (see Appendix A, pp. 30–35). The court held that the provisions of the Oleomargarine Act could not be enlarged by regulation, and an injunction was issued restraining the enforcement of T. D. 4006 so far as it applied to the product there under consideration, which was alleged to be the same as the

product considered in the *Higgins cases*. Following this decision, T. D. 4006 was revoked (C. B. VII–1, p. 334).

1929 (March)—*Harrow-Taylor Butter Co.* v. *Mellon* (Sup. Ct. D. C.), Docket No. 49479 (not reported). Bill to enjoin collection. Preliminary injunction was denied, and the bill later was dismissed.

1929—*Ed S. Vail Butterine Co., The Standard Nut Margarine Co., The Dixie Nut Margarine Co., The Ideal Food Products Co., E. F. Drew & Co., National Foods, Inc., The Ill.-Mo. Manufacturing Co., The Olsen Food Products Co., The Kansas Nut Margarine Co.* v. *Blair* (Sup. Ct. D. C.), Docket No. 49751 (not reported). Preliminary injunction denied and bill dismissed.

1929—*Harrow-Taylor Butter Co.* v. *Crooks* (W. D. Mo.) (not reported). Action to recover tax paid under protest. For copy of opinion see Appendix C, pp. 39–44. The product was held to be taxable.

1930—*Harrow-Taylor Butter Co.* v. *Crooks* (C. C. A. 8th), 41 F. (2d) 627, affirming the judgment of the District Court for the Western District of Missouri in the above case.

1930—*Filbert-Kuhlemann Co.* v. *Tait* (Md.), 1 Prentice-Hall Federal Tax Service, 1931, p. 247 (not otherwise reported). Bill to enjoin collection. Bill dismissed.

1930—*Higgins Mfg. Co.* v. *Burnet* (Sup. Ct. D. C.), Docket No. 51890 (not reported). Action to enjoin collection of tax. Permanent injunction granted. Now pending on appeal to the Court of Appeals of the District of Columbia.

1930—*Standard Nut Margarine Company* v. *Burnet* (Sup. Ct. D. C.), Docket No. 52174 (not reported). Bill to enjoin collection of tax. Preliminary injunction granted and further proceedings suspended awaiting the outcome of the instant case.

1930—*Standard Nut Margarine Company* v. *Jones* (E. D. S. C.) (not reported. For copy of the opinion see Appendix to petition for certiorari in this case, pp. 16–27). Action by respondent in the instant case to recover tax paid on the identical product here involved. The court held that the product was taxable and gave judgment for the Government. Respondent did not appeal this case.

APPENDIX C

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI

No. 7569

THE HARROW-TAYLOR BUTTER COMPANY, A MISSOURI corporation, plaintiff

v.

NOAH CROOKS, UNITED STATES COLLECTOR OF INTERNAL REVENUE for the Sixth District of Missouri, defendant

This is an action at law to recover certain taxes which, it is alleged, were paid under protest. A jury was waived by stipulation of the parties and the cause tried to the court.

Said tax was collected under an act approved August 2nd, 1886. That act, with subsequent amendments, imposes a stipulated tax upon manufactured substances classed as oleomargarine. In defining what substances should be so classed, the following pertinent definitions were given in the act:

> All mixtures and compounds of tallow, beef fat, suet, lard, lard oil, *vegetable oil annotto,* and other coloring matter, etc.

It was further provided by said act that all substances falling within the above definition should be taxable if "made in imitation or semblance of butter, or when so made, calculated or intended to be sold as butter or for butter."

U. S. 256, 268; *Galveston Electric Co.* v. *Galveston*, 258 U. S. 388, 402; *Banton* v. *Belt Line Ry.*, 268 U. S. 413, 422; *McCardle* v. *Indianapolis Co.*, 272 U. S. 400, 412; *Russell* v. *Commissioner*, 45 F. (2d) 100, 102 (C. C. A. 1st), as that it was due to the assessment of the tax. Whatever the cause, the District Court was not free to disregard the plain language of Section 3224 of the Revised Statutes, and the court below erred in holding that this case presented unusual and extraordinary circumstances justifying the issuance of an injunction.

We submit there are no real exceptions to the application of Section 3224 of the Revised Statutes if the injunction sought is to restrain the collection of a tax assessed by revenue officers charged with general jurisdiction of the subject of assessing taxes when acting under color of their offices, but if there are any exceptions they do not permit the maintenance of this suit, which presents merely an attempt to test the validity of an assessment alleged to be erroneous in the manner most convenient to the taxpayer.

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
G. A. YOUNGQUIST,
Assistant Attorney General.
WHITNEY NORTH SEYMOUR,
SEWALL KEY,
A. H. CONNER,
Special Assistants to the Attorney General.
C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.
HARRISON F. MCCONNELL,
Special Attorney,
Bureau of Internal Revenue,
Of Counsel.

NOVEMBER, 1931.

The plaintiff has a product which it designates "Rich Nut Shortening." Admittedly it contains no animal fat but is wholly composed of mixtures or compounds of vegetable oils, salt, benzoate of soda, water and artificial coloring matter.

The Commissioner of Internal Revenue determined that such manufactured substance should be classed as oleomargarine and moreover that it was made in imitation or semblance of butter and that it became taxable under said act.

The plaintiff makes the manifold contention (a) that such a substance is not within the purview of the act; (b) that if so, said act is unconstitutional; (c) that the questions here involved have been previously adjudicated and (d) that the evidence shows that such substance was neither made in imitation or semblance of butter nor was it calculated or intended to be sold as butter or for butter.

1. Adverting to the first proposition that said substance is not within the purview of the act, it is to be noted that the act contains the language—

> All mixtures and compounds of * * * vegetable-oil annotto and other coloring matter, etc.

Plaintiff says that vegetable oil was not employed at the date of the enactment in the manufacture of substances such as the substance in question. Moreover, it is insisted that the words vegetable oil were used to describe the word annotto and that said substance was a mere coloring matter. In other words it is the contention of the plaintiff that only mixtures and compounds containing animal fat were defined and classed as oleomargarine.

The defendant, on its part, says that the words vegetable-oil should have been followed by a comma

so as to separate said words from the word "annotto" following.

The plaintiff has presented for the inspection of the court original and authentic records of the act as same was passed and signed by the presiding officers of the House of Representatives and the Senate of the United States. Such record fails to disclose a comma between the words "vegetable-oil" and the word "annotto." Plaintiff offered testimony that a substance known as vegetable-oil annotto as a coloring matter was actually in use at the time of the enactment of said law. On this question, however, there was opposing evidence.

The court is called upon in the first instance to interpret the meaning of said section and to determine whether or not it should be construed as if a comma were in fact inserted. The original records of the bill do not particularly aid in such interpretation. Such records do prove conclusively the enactment of the law.

It is well settled "that punctuation is a fallible standard of the meaning of a statute, and the last resort as an aid in its interpretation, though it may be resorted to as such aid when the meaning of the statute is doubtful." (25 R. C. L. 965, Section 220; *Northern Pacific Railway Co.* v. *United States*, 227 U. S. 355, l. c. 360; 36 Cyc. 1117; Words and Phrases judicially defined.)

Contrary to the evidence offered by plaintiff, the defendant proved that vegetable-oil was not only known but used in the manufacture of similar substance at the time of the enactment of said law. Moreover, the evidence was not satisfactory that such a substance as "vegetable-oil annotto" was ever used extensively for coloring matter.

There was evidence that the printed bill taken from Congressional files showed that a comma was inserted after the word vegetable-oil. Moreover, no reason seemed to exist for designating any single coloring matter as "vegetable-oil annotto." Annotto, according to the evidence, was a coloring matter wholly independent of vegetable-oil.

In the case of *Higgins Mfg. Co.* v. *Page,* 297 Fed. 644, l. c. 651, Judge Brown of the District of Rhode Island granted a request for findings of law, as follows:

> That the phrase "vegetable-oil annotto and other coloring matter" contained in section 2 of the Act of August 2, 1886 (24 Stats. 209), should be read as though there were a comma after the word "oil."

Apparently Judge Brown was of the opinion that the act should be interpreted as if the comma had been inserted. The decision of Judge Brown did not rest on this point, however, but was based upon his view that the product there under inquiry was "not made in imitation or semblance of butter or when so made calculated or intended to be sold as butter or for butter."

With respect to the substance there under inquiry, the Commissioner of Internal Revenue had previously ruled that it was not made in imitation or semblance of butter. The court simply followed the ruling of the Commissioner. Said opinion must be considered, however, as holding that there was such a mixture or compound as could be made up of vegetable-oil and other ingredients, excluding animal fats, and that in a proper case such substances might be classed for the purposes of taxation as oleomargarine.

A reasonable interpretation of said statute would require the insertion of the comma after the word oil and before the word annotto.

2. There is nothing in the language of the act as contended by the plaintiff to indicate a purpose on the part of Congress to regulate rather than tax. The act itself is a pure Revenue Act and has no regulatory features, unless it be in the language that exempts from the tax if not made in imitation and semblance of butter. The right and power of Congress to impose such a tax, even though burdensome, can not be questioned.

3. There has been no adjudication of the questions here involved. Rulings have been promulgated from time to time by the Commissioner of Internal Revenue and such rulings have had the force of law. However, in no case has such a ruling been made and promulgated by the Commissioner of Internal Revenue that might become applicable to the facts here presented. In each ruling certain conditions were named. Such conditions are not present in the instant case. It can not be said that the Commissioner had previously ruled favorably to the plaintiff with respect to the product under inquiry for the reason that the plaintiff did not submit to the Commissioner its product as sold to the public. The samples submitted were without coloring matter.

4. There remains the final inquiry as to whether plaintiff's product is "made in imitation or semblance of butter or when so made calculated or intended to be sold as butter or for butter."

With commendable frankness plaintiff offered testimony as to the nature and character of its product and the demand of the public therefor.

Plaintiff did not by its advertisements, nor by its containers or printed matter offer its product as butter or a substitute for butter, yet the evidence was overwhelming that retail merchants, restaurant keepers and others carried and used plaintiff's product "as butter and for butter."

Retail merchants kept said product with their butter and recognized oleomargarine substances and proffered same to their customers as a suitable substitute for butter. Restaurant keepers regularly served said product as butter and for butter.

The evidence was overwhelming that said substance not only looked like butter but that it had the taste of butter. It was put up in cartons similar in size and shape as butter. It was not used except very moderately for "shortening," as indicated on plaintiff's cartons. Plaintiff acknowledged that sharp competition had forced the use of this substance. Such competition was for butter substitutes. Plaintiff undoubtedly knew that the demand for its product was not alone for "shortening" in baking, but as butter substitute.

It would be idle to say that the plaintiff did not know that its customers, the retail dealers, were selling said substance as a butter substitute. Said substance was not only "made in imitation or semblance of butter" but it was "calculated" and "intended to be sold as butter or for butter."

In view of the foregoing, the judgment of the court will be for the defendant.

Kansas City, Missouri, August 5th, 1929.

ALBERT L. REEVES,
United States District Judge.

APPENDIX D

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

Holding an Equity Court

EQUITY No. 51890

HIGGINS MFG. CO., ETC.

v.

DAVID BURNET ET AL., ETC.

MEMORANDUM

In my judgment, the permanent injunction should be granted in this case as prayed in the bill.

As soon as possible I shall prepare and file findings of fact and conclusions of law to be made part of my decision. But because of the importance of the matter to the plaintiff I think the decree should be signed promptly upon submission by counsel.

1. As to the objection that section 3224 RSUS prohibits the relief, I agree with the reasoning of the decision of Judge Lowell, of the United States District Court for the District of Rhode Island, in *Higgins Mfg. Co.* v. *Page,* that this is one of the cases to which the Supreme Court referred in *Dodge* v. *Osborn,* 240 U. S. 122, as extraordinary and exceptional circumstances; see also Memoran-

dum Opinion of Mr. Justice Bailey in *Baltimore Butterine Co.* v. *Mellon,* Equity No. 47120, granting a preliminary injunction in that case.

2. I am unable to adopt the contention of counsel for the defendants that under section 14 of the Act of 1886, as amended, the act of the Commissioner of Internal Revenue is final on the courts in this particular case. That section authorizes the Commissioner "to decide what substances, extracts, mixtures, or compounds which may be submitted for his inspection in contested cases are to be taxed under this Act"; and upon this "his decision in matters of taxation under this Act shall be final."

The evidence here shows that the action of the Commissioner was not in what may properly be termed a "contested" case. The action of the Commissioner was based upon an ex parte investigation conducted by the agents and chemists of the Bureau of Internal Revenue. There was no hearing; plaintiff was not notified of the investigation, and was given no opportunity to present evidence.

In view of the decisions in favor of plaintiff in *Higgins Mfg. Co.* v. *Page,* 297 F. 645, and *Higgins Mfg. Co.* v. *Page,* 20 F. (2d) 948, I can not believe that any subsequent decision of the Commissioner of Internal Revenue is conclusive upon this Court in the present proceeding.

3. I think it might reasonably be held that the doctrine of *res adjudicata* is applicable in the present case. The suit at law in 297 F. 645 and the injunction suit in 20 F. (2d) 948 were against the Collector of Internal Revenue. No appeal was taken by him from the adverse decisions. To one familiar with the administrative conduct of the executive bureaus it is reasonable to assume that

the failure to appeal was by direction of the then Commissioner of Internal Revenue, the immediate superior of the defendant. This is confirmed by the allegations of the defendants to the answer (par. 13) from which it appears that appeals were not taken because the Government's case was not presented in those cases as strongly as it should have been.

But without holding that the decisions above mentioned constitute *res adjudicata*, I think they are very persuasive and that I should follow them unless a very different case is made out by the evidence presented here.

4. I find from the evidence that Higgins Nut Product is manufactured from the same component materials and marketed by the plaintiff as said product was found to be made and marketed by the plaintiff by the decision and judgment of the United States District Court for the District of Rhode Island in the law case above described, reported in 297 F at 644.

While the defendant has given some evidence tending to show that Higgins Nut Product as now sold is somewhat more like butter than the product sold in 1924, the evidence does not convince me that the present product is substantially different from the old.

Therefore I will sign the decree as above outlined.

JESSE C. ADKINS, *Justice.*

(Not dated. Decree was signed Oct. 15, 1930.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931

No. 251

PETER H. MILLER, Individually and as Collector of Internal Revenue for the District of Florida,

Petitioner,

vs

THE STANDARD NUT MARGARINE COMPANY OF FLORIDA, a Corporation,

Respondent.

MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

GEO. N. MURDOCK
A. Y. MILAM
E. T. McILVAINE
ROBT. R. MILAM
Counsel for Respondent.

MILLER PRESS, JACKSONVILLE

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The respondent, in opposition to the granting of the Writ prayed for by Petitioner, begs leave to present to the attention of this court the following facts as reasons why the writ should not be allowed.

STATEMENT

Respondent disagrees with the statement of facts as set out on page two of petitioner's brief. That statement would tend to cause this court to believe that the case involved only an amount of $5,000.00, while the record shows (p.9,10) that the case really involves a tax of 10 cents per

pound upon all of the product "manufactured and sold from the time business was commenced" as well as involving a tax upon all of respondent's wholesale and retail dealers, and that, as the tax claimed was 10 cents per pound, and the profit 3 cents per pound, it would be absolutely impossible to pay it and sue to recover it back.

The statement of facts as reviewed in the opinion of the Circuit Court of Appeals (R. 80-88) is very clear and concise and the facts briefly are:

The product upon which the petitioner attempted to levy, known as Southern Nut Product, was a mixture of coconut oil, peanut oil, salt, water and coloring matter. It contained no ingredients deleterious to health, was packed only in one pound cartons plainly labelled and showing its ingredients. It was the same as a product which was manufactured by a firm of Providence, Rhode Island, the Higgins Mfg. Co., known as Nut-Z-All, which prior to respondent's entering into the manufacture of the product had been held by Judge Brown in the District Court of Rhode Island (Higgins v. Page, 297 F. 644) not to be oleomargarine or taxable as such. No appeal was taken from that decision. The Commissioner of Internal Revenue had published this decision in the form of a Treasury Decision informing all concerned that that product had been held not to be taxable. The Commissioner had informed an association of oleomargarine manufacturers, known as the Institute of Margarine Manufacturers, that the court had held the product not taxable and that the manufacturers or dealers were not subject to tax as on oleomargarine. The Commissioner again attempted to tax these products by Treasury Decision No. 4006. Judge Lowell, of the District Court of Rhode Island, (R-4-6), and Justices Bailey and Hoehling of the Supreme Court of the District of Columbia, had granted injunctions against the enforcement of the said Treasury Decision on the ground that the facts at that time constituted exceptional and extraordinary circumstances making Sec. 3224 R. S. inapplicable (R-5,6). No appeals

were taken from these decisions. Respondent then inquired of the Commissioner as to the taxability of Southern Nut Product which it contemplated manufacturing and selling, and was informed it had the same right to manufacture it without taxpaying it as oleomargarine as was being enjoyed by those firms which had obtained favorable court decisions. (R7). Petitioner began manufacturing the product which brought a profit of 3 cents per pound and so continued for two years. The respondent's product was before Judge Barrett of the United States District Court of the Southern District of Georgia (Baltimore Butterine Co. vs. Talmadge, 32 Fed. (2) 904) (R8) who decided it was not an imitation of butter, which decision was affirmed by the Circuit Court of Appeals of the 5th Circuit. (37 Fed (2) 1014). All these facts were set out in the bill, and proved on the hearing of the case. The trial court held that the material allegations of the bill had been established, and the Circuit Court of Appeals held that this conclusion was consistent with the Record. (Op. of Court R83,49 Fed (2) p. 82) After these cited court decisions, a bill was introduced in Congress to include such products as Southern Nut Product within the definition of oleomargarine. This bill became law, but was not effective until July 10, 1931. While such bill was being considered, the Committee on Agriculture of the House of Representatives reported that the purpose of the contemplated law was to tax a new class of products, such as Southern Nut Product, stating such products were not within the definition of oleomargarine under the *then* existing law. Congress believed the products were not taxable. The Commissioner of Internal Revenue did not believe such products taxable, and so wrote Congress recommending the passage of the bill. (R84)

In the face of all of the above facts, petitioner attempted to proceed and tax Southern Nut Product. All this is set out in the opinion below, (49 F. (2) 83). (R-80-87).

ARGUMENT

Petitioner relies upon but two specifications of error.

1. Sec. 3224 R. S. prohibits the injunction.
2. The Court erred in holding Southern Nut Product not oleomargarine.

A. *Specification Number One*

This court is limited to the question of law as to whether the facts as found by the District Court and elaborated upon by the Circuit Court of Appeals show such exceptional and extraordinary circumstances as to create an exception to Sec. 3224. Aside from this, the facts are not in issue.

The bill made certain allegations of fact as a basis of the plaintiff's right to an injunction. The answer and amended answer admitted some of these and denied others. The plaintiff offered in evidence testimony, documentary evidence, and physical exhibits; and as a result, the trial judge who heard this testimony, saw the records and the physical exhibits, found that the plaintiff had established the material allegations of the bill. The defendant placed no witness on the stand, nor offered any evidence of any kind.

The appellate court, in its opinion, fully reviewed these facts as shown by the record below, as found by the court below and by other courts dealing with the same subject matter. These facts are before this court now only for the purpose of determining the question of law as to whether, because of the conditions which they show, the court was correct in holding that they constituted such extraordinary and exceptional circumstances as to justify the injunction granted.

The first specification, that is, that the court erred in granting the injunction because of R. S. 3224, depends entirely upon whether the facts as set out in the allegations

of the bill, and proven by respondent at trial, create an exception to Sec. 3224 R. S.

In view of these facts, then, which have been conclusively proven (the question of proof not being before this court), the only question left for decision is whether those facts constituted exceptional and extraordinary circumstances as held by this court to constitute an exception to R. S. 3224. The words of the opinion below, (R80-88) so clearly and fully set out the contention of respondent that no attempt will be made to further elaborate upon or explain them.

Other questions before the lower court have not been specified in the petition, and not being before this court will be given no attention. (U. S. Supreme Court Rule. 27, Par. 2e). No citation of precedents other than those set out in the opinion of the Circuit Court of Appeals (R87) need be given. As stated, this court has explicitly recognized that Sec. 3224 R. S. does not prevent an injunction in a case apparently within its terms in which some extraordinary and entirely exceptional circumstances make its provisions inapplicable.

This leaves only for the consideration of this court the question of whether the facts as presented do constitute such circumstances. In addition to circumstances which have been held in the cited cases to be in the required category, we here have an absolutely arbitrary attitude by revenue officials who have without hearing declared a product taxable and who have, as stated by Mr. Justice Lowell, (R.6) asumed an attitude "entirely above and beyond the law", or, as said by Mr. Justice Railey (R.6), "there would be no end to litigation if the defendant should persist in levying a tax after the courts have held the tax invalid."

This court in the decisions cited in the opinion below (Hill vs. Wallace, 259 U. S. 44) has clearly stated what it considers unusual and exceptional circumstances justifying an exception to Sec. 3224 R. S.

They were—

1. Heavy criminal penalties.

2. Impracticability of the method of paying the tax and suing to recover it back.

3. Destruction of business.

All of these circumstances are present here. Without the protection sought respondent and its dealers are subject to the most severe criminal penalties. Where the profit is less than one third the tax the prepayment and compliance with Sec. 3226 R. S. for recovery is impossible. The destruction of the business was certain. In addition to these circumstances we have the additional ones that the petitioner's acts are contrary to and in defiance of unappealed court decisions. Such acts are contrary to petitioner's own consent upon which respondent relied. Petitioner did not believe the law included respondent's product. Congress did not believe the law included substances such as respondent's product, and amended the law to include such products.

Petitioner, as a reason for granting the writ (P.4), refers to the case of Harrow Taylor Butter Co. vs Crooks. The facts in that case were so different from the facts here in issue as to form no comparative. The District Judge there decided the taxability upon the intention of the user, rather than upon the intention of the seller, as required by the wording of the law.

The Peacock and Jennings cases cited in the brief (P4) are not parallel. There the taxing authorities sincerely believed the levy to be a tax under the Revenue Act then in force and proceeded upon that theory. Here, as shown in the opinion of the Court of Appeals, the Commissioner of Internal Revenue did not believe the law then in force included products similar to respondent's product, and so informed Congress, and recommended legislation to include this new class of products; yet, at the same time arbitrarily

proceeded to collect under the law which did not include them, and in defiance of court decisions holding these products, not taxable.

In McCaughn vs. Hershey Chocolate Co. (May 18, 1931) this court said:

> "The reenactment of a statute by Congress, as well as the failure to amend it, in the fact of administrative construction, is at least persuasive of a legislative recognition and approval of the statute as construed."

This principle has been so often stated by this court as to almost become an axiom. The converse must be equally true, and where a statute is amended for the specific purpose of taxing a product on the express statement of the sponsors of the amendment that the law prior to amendment did not include it, and where the department charged with the enforcement recommends such amendment, it is highly persuasive, in view of the principle that all doubts must be decided in favor of the tax payer, that the product never was taxable under the old law.

We, therefore, submit that the circumstances were so unusual and exceptional as to constitute an exception to R. S. 3224.

B. *Specification Number Two*

On page two, petitioner recites his denial that Southern Nut Product is not oleomargarine. No word of proof was offered by petitioner to prove this allegation, while the evidence of respondent evidently satisfied the court, as other courts had been satisfied, that under the law as it then existed the product was not oleomargarine.

To be oleomargarine a product must come within the legal definition of that substance. It must first contain certain substances, mixtures or compounds, and unless it does contain those prescribed ingredients, it cannot be oleomargarine in any event; next, those substances, mixtures and

compounds do not make oleomargarine without the following test: they must be made in imitation or semblance of butter.

Petitioner seeks to have this court say that the lower court erred when it decided that Southern Nut Product was not oleomargarine, notwithstanding petitioner offered no word of testimony and no line of evidence to show that the ingredients were "made in imitation or semblance of butter, or when so made, calculated or intended to be sold as or for butter." The product is not before this court, but was before the trial court who had opportunity to give it all the tests required by the law, and to decide whether it was made in imitation or semblance of butter; and to compare it with the product of the Higgins Company, which had been held by Judge Brown (297 Fed. 644) not to be oleomargarine; and which the Government was making no attempt to tax, and whose non-taxability was made the basis of the assurance given to respondent that Southern Nut Product was not taxable. How can this court decide that Southern Nut Product was made in imitation or semblance of butter, and that the lower court in this case, the court in Higgins vs Page (297 Fed. 644) and the court in Baltimore Butterine Co. vs. Talmadge (32 Fed (2d) 904) where the product was physically present, were wrong?

FINDINGS OF FACT BY LOWER COURT WILL NOT BE DISTURBED ON APPEAL

Texas & Pac. Ry. vs. Ry. Com. 232 U. S. 338
58 L. ed. 630

Chicago, Junction R. Co. vs. King, 222 U. S. 222,
56 L. ed. 173

Dun vs. Lumbermen's Credit Assn. 209 U. S. 20
52 L. ed. 663

In *Texas & Pac. Ry. vs. Louisiana R. R. Com.*, 232 U. S. 338, the Circuit Court in an equity case for injunction gave judgment sustaining the exceptions to the master's report on the ground that the complainant had failed to prove

its case. On appeal to the Circuit Court of Appeals, the evidence was again reviewed and judgment affirmed. (192 F. 280). An appeal was taken to the Supreme Court. This Court said:

> "Both courts below passed on the facts and agreed in holding that appellant failed to establish by the evidence its right to the relief demanded and the rule is well settled that findings of fact concurred in by two lower courts will not be disturbed by this court unless shown to be clearly erroneous."

In *Dun vs. Lumbermen's Credit Assn.* 209 U. S. 20 this court said:

> "We cannot, as we are asked to do by appellants, reverse the findings of fact made by the Circuit Court of Appeals. Successively considering the same evidence the two courts agree in the findings. In such a case in a suit in equity the findings will not be disturbed by this court, unless they are shown to be clearly erroneous."

Towson v. Moore, 173 U. S. 17
Brainard v. Buck, 184 U. S. 99
Shappirio v. Goldberg, 192 U. S. 232

The above case was cited and approved by the Supreme Court in *Charleston, S. C. M. & M. Co. vs. U. S.* 273 U. S. 220, decided in 1927, which was an equity case where the United States sought to enjoin its opponent from creating any cloud on property which the District Court and Circuit Court of Appeals had found had through fraud been procured from the Government. There, there was a conflict of evidence, but the facts as found by the District Court were sustained by the Circuit Court of Appeals. Justice Taft said:

> "The rule is well established that this court will not disturb a finding of fact made by a District Court in equity concurred in by the Circuit Court of Appeals",

citing:

U. S. vs. State Investment Co. 264 U. S. 206, 211, 68 L. ed. 639, 642;

Brewer-Elliott O. & G. Co. vs U. S. 260 U. S. 77, 86; 67 L.ed. 140, 145;

Bodkin v. Edwards, 255 U. S. 221, 233, 65 L. ed. 595, 601;

Nat'l Bank v. Shackleford, 239 U. S. 81, 82, 60 L. ed. 158

Wright-Blodgate Co. vs U. S. 236 U. S. 397, 402

There being nothing before this court, then, except the determination of whether the facts as found by the trial court, and affirmed by the appellate court, create circumstances justifying an exception to R. S. 3224, we present that the petition should be denied.

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DEC 5
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931

No. 251

PETER H. MILLER, Individually and as Collector of Internal Revenue for the District of Florida,

Petitioner,

v.

THE STANDARD NUT MARGARINE COMPANY OF FLORIDA, a Corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY BRIEF FOR THE RESPONDENT

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY BRIEF FOR THE RESPONDENT

I.—OPINIONS BELOW

The opinion of the District Court has not been officially reported, but the views of that Court, after hearing the evidence, are set out in the Record at page 43 to 45, and at page 69 of the Record the Court said:

> "I think the essential averments of this bill have been shown here. Let a decree be entered in accordance with the prayer of the bill."

The opinion of the Circuit Court of Appeals for the Fifth Circuit fully reviewed the extraordinary and exceptional circumstances which it held justified the granting of the injunction, and is set out on pages 75 to 83 of the Record and is reported in 49 Fed. (2d), 79.

II.—QUESTIONS PRESENTED

Respondent does not concede that the questions presented is as stated by the petitioner. The questions presented in the petitioner's brief differs from the questions as presented in the petition for certiorari. The questions as viewed by respondent are:

(1) Whether or not the circumstances, as alleged and proven, present such extraordinary and exceptional circumstances as to constitute an exception to Section 3224 R. S.; and

(2) Is the Commissioner of Internal Revenue acting under the color of his office and immune from injunction when he persists in attempting to assess and coerce the payment of money under the guise of a tax after it has been judicially decided by District Courts of the United States on hearings on the facts that the products in question are not taxable?

III.—STATEMENT

Respondent disagrees with the statement of facts as set out on page two of petitioner's brief. That statement would tend to cause this court to believe that the case involved only an amount of $5,000.00, which was the estimated tax demanded for the month of January, 1929; while the record shows (p. 9, 10) that the case really involves a tax of 10 cents per pound upon all of the product "manufactured and sold from the time business was commenced", which was for a period of more than two years, as well as involving a tax upon all of respondent's wholesale and retail dealers; and that, as the tax claimed was 10 cents per pound, and the profit 3 cents per pound, it would be absolutely impossible to pay it and sue to recover it back.

The fact is, as alleged in the bill of complaint below, that an enormous sum amounting to ten cents per pound upon its production for a period of those two years is involved, as well as the complete destruction of the trade built up by respondent with its dealers, on the faith of a permit from the Commissioner of Internal Revenue to operate tax free.

The statement of facts as reviewed in the opinion of the Circuit Court of Appeals (R 80-88) is very clear and concise and the facts as there stated briefly are:

The product upon which the petitioner attempted to levy, known as Southern Nut Product, was a mixture of cocoanut oil, peanut oil, salt, water and coloring matter. It contained no ingredients deleterious to health, was packed only in one pound cartons plainly labelled, and showing its ingredients. It was the same as a product which was manufactured by a firm of Providence, Rhode Island, the Higgins Mfg. Co., known as Nut-Z-All, which, prior to respondent's entering into the manufacture of the product, had been held by Judge Brown in the District Court of Rhode Island (Higgins v. Page, 297 F. 644), not to be oleomargarine or taxable as such. The government took no appeal from that decision. The Commissioner of Internal Revenue published this decision in the form of a Treasury Decision informing all concerned that that product had been held not to be taxable. The Commissioner had informed an association of oleomargarine manufacturers, known as the Institute of Margarine Manufacturers, that the court had held the product not taxable and that the manufacturers or dealers were not subject to tax as on oleomargarine. The Commissioner again attempted to tax these products by Treasury Decision No. 4006. Judge Lowell, of the District Court of Rhode Island, (R-4-6), and Justices Bailey and Hoehling of the Supreme Court of the District of Columbia, had granted injunctions against the enforcement of the said Treasury Decision on the ground that the facts at that time constituted exceptional and extraordinary circumstances making Sec. 3224 R. S. inapplicable (R-7). No appeals were taken from these decisions. Respondent then inquired of the Commissioner as to the taxability of a similar product, Southern Nut Product, which it contemplated manufacturing and selling, and was informed that it had the same right to manufacture such a product without taxpaying it as oleomargarine as was being enjoyed by those firms which had obtained favorable court decisions. (R 8) Petitioner began manufacturing the pro-

duct which brought a profit of 3 cents per pound, and at the time of the filing of this suit had so continued for two years. The respondent's product was before Judge Barrett of the United States District Court of the Southern District of Georgia (Baltimore Butterine Co. vs. Talmadge, 32 Fed. (2) 904), (R 8), who decided it was not an imitation of butter, which decision was affirmed by the Circuit Court of Appeals of the 5th Circuit. (37 Fed. (2) 1014). All these facts were set out in the bill, and were proved on the hearing of the case. The trial court held that the material allegations of the bill had been established, and the Circuit Court of Appeals held that this conclusion was consistent with the Record. (Op. of Court R 83, 49 Fed. (2) p. 82). The petitioner offered no evidence. After these cited court decisions, a bill was introduced in Congress to include such products as Southern Nut Product within the definition of oleomargarine. This bill became law July 10, 1930, but was not effective until July 10, 1931. While such bill was being considered, the Committee on Agriculture of the House of Representatives reported that the purpose of the contemplated law was to tax a new class of products, such as Southern Nut Product, stating such products were not within the definition of oleomargarine under the then existing law. Congress believed the products were not taxable. The Commissioner of Internal Revenue did not believe such products taxable, and so wrote Congress recommending the passage of the bill. (Opinion R. 79).

In the face of all of the above facts, petitioner attempted to tax Southern Nut Product, and assessed an estimated tax of $5000.00 for the month of January 1929. He also demanded to know the amount of the product which had been manufactured for two years past, for which he stated, "an additional assessment will be made." (R. 9). All this is set out in the opinion below, (49 F. (2) 83). (R. 80-87).

IV.—SPECIFICATION OF ERROR URGED BY PETITIONER

Since petitioner has not in his brief assigned specification of error No. 2 as set forth in the petition, it is taken for granted that said specification is abandoned. The petitioner assigns in his brief, as the sole specification of error, that Section 3224 prohibits an injunction in a case of this kind.

V.—SUMMARY OF ARGUMENT

1. The facts in this case make it an exception to Section 3224 R. S.

2. Summary of exceptional circumstances making this case an exception to 3224 R. S.:

   (1) Identical with Nut-Z-All.

   (2) Permit to Higgins Manufacturing Company to manufacture Nut-Z-All tax free.

   (3) Attempt to revoke permit.

   (4) and (5) Higgins recovers tax at law.

   (6) This decision published as T. D. 3590.

   (7) Letter to oleo manufacturers product not taxable.

   (8) T. D. 4006 attempted to tax enjoined.

   (9) Baltimore Butterine Company obtains injunction.

   (10) Commissioner's permit to respondent to manufacture tax free.

   (11) Judge Barrett's decision this product not in imitation of butter.

   (12) Estimated assessment and levy of $5000 for one month and similar demand for 24 additional months.

   (13) and (14). Size of tax and amount demanded made payment impossible.

(15) Higgins Co. still allowed to sell tax free.

(16) Commissioner advised Congress product not taxable and requests law to make it taxable.

3. The case of Hill v. Wallace and the facts there held to constitute exceptional and extraordinary circumstances
Analysis of exceptional and extraordinary circumstances in Hill v. Wallace:

(1) Heavy criminal penalties

(2) Legal remedy would destroy business

(3) Multiplicity of suits

(4) Tax most burdensome

4. Circumstances of Hill v. Wallace compared to those in case at bar.

(1) Civil and criminal penalties under the oleo law and cases cited.

(2) Destruction of plaintiff's business built under permit from Commissioner entitled to relief in advance of injury.

(3) Multiplicity of suits

(4) Most burdensome tax because amount incurred under permit too large to be paid.

Conclusion of law and fact made by Circuit Court of Appeals.

5. The claim of "color of office."
Claim that Section 14 of oleo act justified the findings of Commissioner in the face of court decrees etc.
CCA ruling on Section 14 of oleo act.
Justice Adkins construction of Section 14 of oleo act.
Judge Brown's ruling on justification under Section 14 after court decrees contra.

Justice Bailey's ruling tax cannot be levied after courts have held same invalid.

6. Respondent's product was not oleomargarine

(a) It was not made in imitation or semblance of butter.

(b) It did not contain the enumerated statutory ingredients.

(1) Vegetable fats not included under law.

(a) Respondent's product contains no animal fat.

(b) Oleo law only names animal fats and coloring matter.

(c) Statute covered only products heretofore known as oleo.

(d) Attempted insertion of comma by department to make vegetable oils taxable.

(e) Solicitor General's statement as to vegetable-oil.

(f) Judge Brown doubted that animal fats were intended to be included.

(g) Statute cannot be changed by department by addition of comma to make product taxable.

(h) Taxation laws construed in favor of taxpayer and all doubts resolved against the tax.

(i) Conditions at time law was passed—these products were unknown.

(2) Treasury Department and Congress both admit the law did not tax this product.

(a) The new law effective July 10, 1931.

(b) The author, Mr. Haugen represented to Congress that law did not tax these products.

(c) Similar report to Congress by Commissioner of Agriculture.

(d) Similar remarks by Mr. Purnell, sponsor of the 1930 law.

(e) Senator Norbeck stated to Congress that these products escaped the former law.

(f) Commissioner himself recognized products not taxable and so wrote Congress in advocating new law to tax them.

(g) Senator McNary's statement new law designed to tax products not then taxable.

The opinions of legislative bodies are persuasive on the courts in construing statutes.

(a) The practical construction placed by Congress on statute in cases of doubt is controlling.

Circuit Court of Appeals judgment that vegetable products not taxable and therefore 3224 does not apply inasmuch as there was no law purporting to tax such a product.

VI.—ARGUMENT

1. The Facts in This Case Make it an Exception to Sec. 3224 R. S.

This case involves solely the question of law as to whether the facts as found by the District Court, and elaborated upon by the Circuit Court of Appeals, show such exceptional and extraordinary circumstances as to create an exception to Sec. 3224 R. S. Aside from this, the facts are not in issue.

The bill made certain allegations of fact as a basis of the plaintiff's right to an injunction. The answer and amended answer admitted some of these and denied others. The plaintiff offered in evidence testimony, documentary evidence, and physical exhibits; and as a result, the trial judge, who heard

this testimony, and saw the records and the physical exhibits, found that the plaintiff had established the material allegations of the bill. The defendant placed no witness on the stand, nor offered any evidence of any kind. He based his defense solely upon the claim of lack of jurisdiction because of the bar of Section 3224 R. S.

The appellate court, in its opinion, fully reviewed these facts as shown by the record below, as found by the court below, and by other courts dealing with the same subject matter. These facts are before this court now only for the purpose of determining the question of law as to whether, because of the conditions which they show, the court was correct in holding that they constituted such extraordinary and exceptional circumstances as to justify the injunction granted.

The specification of error that the court erred in granting the injunction because of R. S. 3224, depends entirely upon whether the facts as set out in the allegations of the bill, and proven by respondent at trial, create an exception to Sec. 3224 R. S.

2. Summary of Exceptional Circumstances Making This Case an Exception to Section 3224 R. S.

In order that this court may know what the existing circumstances were, they are here set out as shown by the record. They were:

1. The product which petitioner attempted to tax (Southern Nut Product) was identical to a product (Nut-Z-All) manufactured and sold by the Higgins Mfg. Co. of Rhode Island.

(2) The Higgins Manufacturing Co. had in January 1922 received a permit from the Commissioner of Internal Revenue to manufacture and sell Nut-Z-All without tax paying it as oleomargarine (297 Fed. 645).

(3) In Dec. 1922 the Commissioner revoked this permit and held the product taxable. (297 Fed. 646).

(4) The Higgins Mfg. Co. paid a tax on the product and sued the collector to recover it back.

(5) After a lengthy trial upon the facts Judge Brown held the product not to be oleomargarine and not taxable as such. (297 Fed. 651.) (R. 2.)

(6) The Commissioner published the decision as a Treasury Decision (T. D. 3590) (R. 2) for the information of all concerned.

(7) The Commissioner by letter advised an association of oleomargarine manufacturers that such products were not taxable as oleomargarine (R. 3) and that their manufacture and sale would not render either the manufacturer or dealer liable to a tax.

(8) In July 1927 the Commissioner again sought to tax as oleomargarine the product of the Higgins Mfg. Co. by virtue of a treasury decision (T. D. 4006) and was restrained by Judge Lowell as being in defiance of the decision of the court and constituted an extraordinary and exceptional situation which justified injunctive relief. (20 Fed. (2) 948) R. 6) The decision was not appealed by the government.

(9) In July 1927 the Commissioner under the authority of said Treasury Decision sought to tax as oleomargarine a product of the Baltimore Butterine Co. known as Nuine, identical to respondent's product, but was enjoined from doing so by Justices Bailey and Hoehling of the Supreme Court of the District of Columbia (R. 6) on the ground that such an attempt constituted exceptional and extraordinary circumstances justifying injunctive relief.

(10) Respondent then sought a ruling by the Commissioner's office as to the taxability of its product, Southern Nut Product, and was advised it had the same privilege to manu-

facture the product without taxpaying it as oleomargarine as was being enjoyed by those manufacturers who had received favorable court decisions. (R. 8)

(11) In May 1929 respondent's product was before Judge Barrett of the District Court of Georgia on a charge that it was adulterated and misbranded under the terms of the Food and Drugs law of that state in that it imitated creamery butter, one of the questions at issue being the allegation by the State of Georgia that the product was oleomargarine. After a lengthy hearing the court decided that the product was not an imitation of butter or of anything else. This decision was affirmed by the Circuit Court of Appeals for the 5th Circuit. (R. 8, 9)

(12) The Commissioner then placed an assessment upon respondent's product which he estimated had been produced in January, 1929 in the sum of $5,000.00, and ordered petitioner to ascertain the amount manufactured from the time business was commenced upon the full amount of which an assessment would be made. (R. 9)

(13) No analysis or inspection of respondent's product had ever been made, as required by Section 14 of the oleomargarine law.

(14) That the tax was approximately three times the profit on the goods and the payment of the demand and suit for recovery was an impossibility and would render respondent insolvent. (R. 10)

(15) No effort was being made to tax the product of the Higgins Manufacturing Company in Florida, which was being sold tax free at the time of trial, (R. 53) in respondents immediate territory.

(16) The Commissioner did not believe such products taxable and requested Congress to pass a law which would

make them taxable. (R. 78, 79). Such a law was passed June 10, 1930, effective July 10, 1931. (Petitioner's brief, pp. 31, 32).

3. The Case of Hill vs. Wallace, and the facts there existing held to constitute exceptional and extraordinary circumstances.

Do all of these facts constitute such extraordinary and exceptional circumstances as to justify an injunction notwithstanding Section 3224 R. S.? We have no definition of what constitutes exceptional and extraordinary circumstances, but this court, in Hill vs. Wallace 259 U. S. 44, enumerated certain things which make the provisions of Section 3224 inapplicable. That case was a bill in equity to restrain the Collector of Internal Revenue from levying a tax of 20c per bushel on all sales of grain for future delivery. Because of its importance it is hereby fully quoted for the convenience of this court:

> "A further question arises as to whether this is a suit for an injunction against the collection of the tax, in violation of S. 3224, Rev. Stat. Comp. Stat. S. 5947, Fed. Stat. Anno. 2d ed. p. 1032, in so far as it seeks relief against the district attorney and collector of internal revenue. Were this a state act, injunction would certainly issue against such officers, under the decisions in Ex Parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L. R. A. (N. S.) 932, 29 Sup. Ct. Rep. 441; 14 Ann. Cas. 764; Ohio Tax Cases, 232 U. S. 576, 587, 58 L. ed. 738, 743, 34 Sup. Ct. Rep. 372; McFarland v. American Sugar Ref. Co. 241 U. S. 79, 82, 60 L. ed. 899, 902, 36 Sup. Ct. Rep. 498. Does S. 3224, Rev. Stat. prevent the application of similar principles to a Federal taxing act? It has been held by this court, in Dodge v. Brady, 240 U. S. 122, 126, 60 L. ed. 560, 562, 36 Sup. Ct. Rep. 277, that S. 3224 of the Revised Statutes does not prevent an injunction in a case apparently within its terms in which some extraordinary and entirely exceptional circumstances make its provisions inapplicable. See also Dodge v. Osborn, 240 U. S. 118, 122, 60 L. ed. 557, 560, 36 Sup. Ct. Rep. 275. In the case before us, a sale of grain for future delivery without pay-

ing the tax will subject one to **heavy criminal penalties.** To pay the heavy tax on each of many daily transactions which occur in the ordinary business of a member of the exchange, and then sue to recover it back, would **necessitate a multiplicity of suits,** and indeed, would be impracticable. For the Board of Trade to refuse to apply for designation as a contract market, in order to test the validity of the act, **would stop its 1600 members in a branch of their business most important to themselves and to the country.** We think these exceptional and extraordinary circumstances with respect to the operation of this act make S. 3224 inapplicable." (Blackface type ours).

An analysis of the above decision shows that the conditions which this court considered extraordinary and exceptional are:

(1) Heavy criminal penalties.

(2) The legal remedy to test the validity of the law, "would stop 1600 members" (of the Board of Trade) in that business.

(3) A multiplicity of suits.

(4) A tax of 20c per bushel on grain sold would be **most burdensome.**

4. Circumstances in Hill vs. Wallace compared to those in case at bar.

Applying the test for extraordinary and exceptional circumstances as set out in Hill vs. Wallace to this case, we find:

(1) HEAVY CRIMINAL PENALTES.

(a) The penalties involved in a violation of this law are so heavy and severe that no one would dare to risk a violation of the law to test its application. A violation would subject the manufacturer to fines from $1000 to $5000, the wholesaler who handled it to a tax of $480.00 with penalties and fines

from $500.00 to $2,000.00, and the retailer who handled it to a tax of $48.00 with penalties and fines from $50.00 to $500.00. The law bristles with the severest of punishments for the slightest variation from the prescribed conduct of the business, even to the extent of forfeiture of factory and materials, besides imprisonment up to two years. Section 11 of the act goes so far as to make the purchasing public liable to a penalty of $50.00 for each purchase of oleomargarine not properly branded and stamped.

That injunction is the proper remedy under such circumstances is shown by the case of Santa Fe Railroad Co. v. Lane, 244 U. S. 492, 497, 61 L. Ed. 1275, 1280 which involved the right to enjoin an unauthorized act of an executive official done under color of his office. This court said:

> "Thus the demand was an unauthorized act, done under color of office, and the defendant properly may be enjoined from insisting upon or giving effect to it. The plaintiff was not required in order to test the validity of the demand to permit the 90 days to pass and rely entirely upon such suit as might be brought by the attorney general. On the contrary, if the demand was unlawful, as we hold it was, the plaintiff was entitled to sue in equity to have the defendant enjoined from insisting upon or giving effect to it. The hazards and embarrassments incident to any other course were such as to entitle it to act promptly and affirmatively and of course, there was no remedy at law that would be as plain, adequate and complete as a suit such as this against the defendant."

Again in Ex Party Young, 209 U. S. 123, 163, 52 L. Ed. 730, involving the right to enjoin criminal proceedings the Court said:

> "It has been suggested that the proper way to test the constitutionality of the act is to disobey it at least once, after which the company might obey the act pending subsequent proceedings to test its validity. But in the event of a single violation the prosecutor might not

avail himself of the opportunity to make the test as obedience to the law was thereafter continued. He might think it unnecessary to start an inquiry. If, however, he should do so while the company was thereafter obeying the law, several years might elapse before there was a final determination that the law was invalid, the property of the company would have been taken during that time without due process of law and there would be no possibility of its recovery."

In the [redacted] Detroit Creamery Co. v. Kinnane, 254 Fed. 845 cited abo[redacted]as sought to restrain the enforcement of an alleged unconstitutional criminal statute. The Court there said:

"Plaintiffs, however, are not required to wait until criminal prosecutions are actually brought against them before invoking the equitable relief to which they are entitled under the circumstances. Vicksburg Waterworks Co. v. Vicksburg, 185 U. S. 65, 22 Sup. Ct. 585, 46 L. ed. 892."

(2) DESTRUCTION OF BUSINESS.

Another of the exceptional circumstances constituting an exception to Section 3224 as set out in Hill v. Wallace, was that to test out the act would "stop the business of 1600 members," "in a branch of their business most important to them."

In this case, unless restrained by the Court the tax levy would have not only stopped the business of appellee in this case; but it would also have stopped the business of all its wholesalers and its hundreds of retailers, and the business once destroyed could not have been resumed or its destruction compensated for, the damage irremediable and the amount unascertainable.

"It often happens, however, that the case is such that the person illegally taxed would suffer irremediable damage, or be subjected to vexatious litigation, if he were compelled to resort to his legal remedy alone."

In the case cited by Judge Lowell in Higgins v. Page, 20 Fed. (2d) 948, Acklin v. People's Savings Assn., 293 Fed. (D. C. Ohio) at 394 the Court said:

> "While it is a settled practice, by decision of the Supreme Court in the Dupont and other cases, that the remedy of a taxpayer is in the Bureau of Internal Revenue under Section 3224 et seq., Revised Statutes, and that ordinarily he may not enjoin the collection of a tax, but must pay the tax and seek a refund in the department, nevertheless the existence of exceptional cases is recognized. Dodge v. Osborn, 240 U. S. 118, 36 Sup. Ct. 275, 60 L. ed. 557; Hill v. Wallace, 259 U. S. 44, 42 Sup. Ct. 453, 66 L. ed. 822. It is easily conceivable that there are and must be cases in which the rights and property of a taxpayer will be utterly destroyed, if he is compelled to pay an alleged tax and pursue his remedy in the department, wherefore, when the facts clearly show that the pursuit of the ordinary statutory remedy will inevitably result in such destruction, a court of equity may take juridistion to grant relief and to furnish an adequate remedy."

That was a suit by a stockholder to restain the association from paying a tax alleged to have been illegally demanded.

The fact that one becomes liable to the severest punishment for violation of the Oleomargarine Act, and that there is no way of testing this liability short of violation, is sufficient in itself to justify the injunction.

In the recent case of Federal Trade Commission v. Miller's Nat. Federation, 23 Fed. (2d) at 968, 972, the court of appeals for the District of Columbia said:

> "In Terrace v. Thompson, 263 U. S. 197, 44 S. Ct. 15, 68 L. ed. 255, jurisdiction in equity to determine the validity of the Anti-Alien Law of the State of Washington (Laws 1921, p. 156), where the fines and imprisonment threatened were less than those imposed by Section 10,

the court said: 'They are not obliged to take the risk of prosecution, fines, and imprisonment, and loss of property, in order to secure an adjudication of their rights.' It thus appears that it is not necessary, as suggested by counsel for the Commission, that the possible fines and penalties be so enormous as 'to stagger the imagination' before a court of equity will intervene. The gravity of the penalty is not controlling, since the mere risk of imprisonment is sufficient to deter the average person into submission to the restrictions of a statute, thus depriving the person, company, or corporation affected of any remedy to test is validity. This rule as to equity jurisdiction is upheld in a number of recent cases by the Supreme Court. Truax c. Raich, 239 U. S. 33, 37, 39, 36 S. Ct. 7, 60 L. ed. 131; Oklahoma Operating Co. v. Love, 252 U. S. 331, 336-338, 40 S. Ct. 338, 64 L. ed. 695; Stafford v. Wallace, 258 U. S. 495, 42 S. Ct. 397, 66 L. ed. 735, 23 A. L. R. 229."

The general principle is most concisely set out in Dows v Chicago, 11 Wall. 108, as follows:

"A suit in equity will not lie to restrain the collection of a tax on the sole ground that the tax is illegal. There must exist in addition special circumstances bringing the case under some recognized head of equity jurisdiction, such as the enforcement of tax would lead to a multiplicity of suits, or produce irreparable injury, or where the property is real estate throw a cloud upon the title of complainant.

"It is well settled that the remedy at law to oust the jurisdiction in equity must be as practical and efficient to the ends of justice and its prompt administration as the remedy in equity."

Lancaster v. Police Jury, 254 Fed. 179 (D. C. La.)

Tyler v. Savage, 143 U. S. 95, 36 L. ed. 82.

We should not be required to sit idly by and watch our business disappear, and then when it is gone, try in law to

prove that it should not have been killed. This is not the law. The law is that **appellee is entitled to relief in advance of the injury.**

It is further represented to this Court that in undertaking to tax these products petitioner is defiantly proceeding in the face of the very court decisions upon which he based his approval of the manufacture by appellee. He is doing exactly what was so severly criticised by Justice Bailey of the Supreme Court of the District of Columbia, when he said:

> "There would be no end to litigation if the defendant should persist in levying a tax after the courts have held the tax invalid, and the injury would be irreparable and the amount unascertainable."

See (R. page 6) Baltimore Butterine Co. vs. Mellon, unreported.

That decision restrained the Treasury Department from taxing a product indentical to Southern Nut Product, and involved the same question as is at issue in this case.

(3) THE INJUNCTION PRAYED FOR WILL PREVENT A MULTIPLICITY OF SUITS.

Respondents customers were, if the relief prayed for were not granted, subject to an exorbitant tax and penalty under the law as dealers. Southern Nut Product was only one of hundreds of articles dealt in by them. To protect themselves, it would have been necessary for each customer to have payed this tax and sued to recover.

(4) THE PROPOSED TAX IS MOST BURDENSOME.

The proposed tax in Hill vs. Wallace was 20c per bushel or, as the court said, one-fifth of the value. In this case the manufacturers's tax of 10c per pound is at least 50 per cent of the value of the goods sold, and over three times the profit as alleged in the bill. Thus every time Respondent sold a pound

of Southern Nut Product, it incurred a net loss of 7c. This would appear to be "most burdensome." The tax upon the retailer is $48.00 per year, or almost $1.00 per week, and upon the wholesaler $480.00 per year, or almost $10.00 per week. It is difficult to conceive of a more "burdensome" or destructive levy. This is especially true when the fact that respondent's competitor, the Higgins Mfg. Company, protected by injunction was selling its identical product in respondent's territory, tax free.

In addition to all of these circumstances we have the additional one that the respondent had no adequate remedy at law. The tax demanded was not one that had been added to the cost of the goods and collected by respondent and its amount was several times the net worth of the corporation.

The foregoing discussion and citations, with respect to Section 3224, are of value in this case as showing that under certain circumstances, a tax may be enjoined. Respondent could not pay and sue to recover. The amount is so great that it cannot be paid. Unless the relief prayed for was granted, its business was destroyed. This business, built up by the expediture of time and money, was property or a property right. The action of appellant was illegal, arbitrary and unreasonable, and an open defiance of the decisions of the United States Courts. Appellee was suffering irremediable and irreparable injury and had no remedy (adequate or otherwise) at law, and was in a position where, in equity, it was entitled to relief by the Court, in that the decisions of other courts might not be disregarded. Recent statutes have created exceptions to Section 3224, and in respect to income and estate taxes have relieved taxpayers of the burden of payment and suit to recover (Sec. 274 D. Rev. Act 1924). Courts are no longer leaving taxpayers to the mercy of arbitrary departmental decrees in tax measures, but are protecting taxpayers by injunction; and particularly where rights have accrued on the faith of departmental rulings sought to be reversed.

In Long v. Rasmussen, 281 Fed. 236 (D. C. Mont.), the Collector sought to distrain on property of the plaintiff for the taxes of another. The court in granting the injunction, said:

> "The suit is not against the United States but against an individual who as an officer of the United States in discharge of a discretionless ministerial duty, upon plaintiff's property is committing without authority, contrary to his duty and in violation of the due process of the Constitution and the Revenue laws of the United States positive acts of trespass for which he is personally liable.
>
> "Section 3224 R. S. that 'no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court applies to taxpayers only, and who, thus deprived of one remedy are given by another section, 3226 R. S. an action to recover after taxes paid and repayment denied by the Commissioner, nor are they limited to this statutory remedy, but, after taxes paid may have trespass or other action against the Collector.
>
> "The Revenue laws are a code or system in regulation of tax assessment and collection. They relate to taxpayers, and not to non-taxpayers. The latter are without their scope. No procedure is prescribed for non-taxpayers and no attempt is made to annul any of their rights and remedies in due course of law. The instant suit is not to restrain assessment or collection of taxes of Wise, but is to enjoin trespass upon property of plaintiff, and against whom no assessment has been made, and of whom no collection is sought."

Cited and approved in Trinacia Real Estate Co. v. Clark, 34 Fed. (2) 325 (D. C. N. Y.) where assessment of tax against transferee of property was restrained, the Court saying (327):

> "Section 3224 R. S. however does not prevent an injunction in a case apparently within its terms in which some extraordinary and entirely exceptional circumstances make its provisions inapplicable."

Dodge v. Brady, 240 U. S. 122; Hill v. Wallace, 259 U. S. 44.

Section 3224 must be taken and considered not as an independent and isolated section, but in connection with the other sections of the law where it is found. Section 3226 was not available to Respondent, hence it should not have been bound by Section 3224.

When special and extraordinary circumstances of hardships are shown the courts are free to disregard the provisions of R. S. 3224 and prevent by injunctions the collection of a tax. After due consideration of the foregoing facts and law the Circuit Court of Appeals came to the following conclusion:

> "The claim of the defendant that he was legally authorized to coerce the payment of the so-called tax, when that claim was attempted to be sustained in the trial which resulted in the decree appealed from, was made in such circumstances as to be merely colorable, in effect a frivolous pretense that his action in that regard was in compliance with an official duty imposed by law, that claim then being made after it had been judicially determined several times, in suits to which defendant's official superior or the latter's subordinate was a party, that the statute relied on imposed no tax on products of identically the same kind as plaintiff's Southern Nut Product; **after the defendant had influenced the plaintiff to engage in the manufacture of that product by informing him that it was not taxable under the oleomargarine act.**" (Bold face type ours)

> "We think it would be a manifest perversion of the statute in question to permit it to be made the means of enabling a tax official to obtain exemption from being restrained from enforcing an exaction **which no legislation purports to provide for, and which, in suits to which that official or his official superior was a party, have been judicially determined not to be authorized by law.** (Bold face type ours). We conclude that the court, in awarding the injunction complained of, did not, within the meaning of the statute now under consideration, restrain the assessment or collection of any tax." (R. pp. 82 and 83)

5. An act done by an official under color of his office cannot prevail as against adverse court decisions on the same subject.

Petitioner seeks to justify the acts of the Commissioner of Internal Revenue in this case on the ground that what was done was properly done "under color of his office", and that not matter how arbitrary, capricious or contemptuous those acts were they could not be enjoined as long as the Commissioner, "under color of his office" decided that a tax was due.

He refers to the power given the Commissioner by Sec. 14 of the Oleomargarine Law to determine what substances and compounds are taxable as oleomargarine. Section 14 is as follows:

> "Sec. 14 (Act Aug. 2, 1886). That there shall be in the office of the Commissioner of Internal Revenue an analytical chemist and a microscopist, who shall each be appointed by the Secretary of the Treasury, and shall each receive a salary of two thousand five hundred dollars per annum; and the Commissioner of Internal Revenue may, whenever in his judgment the necessities of the service so require; employ chemists and microscopists, to be paid such compensation as he may deem proper, not exceeding in the aggregate any appropriation made for that purpose. And such Commissioner is authorized to decide what substances, extracts, mixtures, or compounds which may be submitted for his inspection in contested cases are to be taxed under this Act; and his decision in matters of taxation under this Act shall be final."

In respect to the contention of petitioner attention is directed to the decision below (R. 80) where the Court in discussing that claim of petitioner said:

> "The so-called finding, evidenced by the above mentioned letter of the Deputy Commissioner of Internal Revenue, to the effect that plaintiff's product, Southern Nut Product, is colored oleomargarine, and taxable as such, was made when there was before the official who

made that finding **no contested case involving the question whether that product was or was not taxable under the law then in force.** (Bold face type ours.) The way in which that action appears to have been taken persuasively indicates that it was based on an exparte investigation, without any hearing of which plaintiff was notified, without plaintiff being given an opportunity to present evidence, and without the introduction or consideration of any evidence having a tendency to prove that plaintiff's product is such a one as was covered by the statute then in force."

The same point is well illustrated by the language of Justice Adkins of the Supreme Court of the District of Columbia in the case of Higgins Mfg. Co. v. Burnet (p. 46 Pet. Brief), as follows:

"I am unable to adopt the contention of counsel for the defendants that under section 14 of the Act of 1886, as amended, the act of the Commissioner of Internal Revenue is final on the courts in this particular case. That section authorizes the Commissioner 'to decide what substances, extracts, mixtures or compounds which may be submitted for his inspection in contested cases are to be taxed under this Act'; and upon this 'his decision in matters of taxation under this Act, shall be final'.

The evidence here shows that the action of the Commissioner was not in what may properly be termed a 'contested' case. The action of the Commissioner was based upon an ex parte investigation conducted by the agents and chemists of the Bureau of Internal Revenue. There was no hearing; plaintiff was not notified of the investigation, and was given no opportunity to present evidence.

In view of the decisions in favor of plaintiff in Higgins Mfg. Co. v. Page, 297 F. 645, and Higgins Mfg. Co. v. Page 20 F. (2) 948, I cannot believe that any subsequent decision of the Commissioner of Internal Revenue is conclusive upon this Court in the present proceeding."

The contention of petitioner that the wording of said Sec. 14 makes any decision that the Commissioner chooses to make with respect to the taxability of oleomargarine final cannot be sustained. As Judge Brown said in the Higgins case, supra,

> "If it be true, as contended by defendant, that a tax may be collected, although it has been judicially determined to be illegal, the result will be that the taxing authorities are entirely above and beyond the law."

Or, expressed by Mr. Justice Bailey in Baltimore Butterine Co. vs. Mellon, (R. 7):

> "There would be no end to litigation if the defendant should persist in levying a tax after the courts have held the tax invalid."

It must, therefore, be here determined whether or not the theory that the determination of a Commissioner of Internal Revenue is **prima facie** correct; and that he is protected by the claim of "color of his office" against an injunction, is to be sustained when the courts have held prior to such determination that no tax was due, and where the courts have decided that the things done "under color of his office" were illegally done.

6. Respondent's Product was not Oleomargarine.

(a) It was not made in imitation or semblance of butter.

The decision of the question as to whether mixtures and compounds of vegetable oils constitute oleomargarine under the law is not essential to the determination of this case, since the primary tests are whether the ingredients, whatever they are, are made in imitation or semblance of butter, and this question was decided in the negative with respect to Southern Nut Product by Judge Barrett (Baltimore Butterine Co. v. Talmadge, 32 Fed. (2) 904 (R. 8) and with respect to the identical product of the Higgins Mfg. Co. (Higgins Mfg. Co. v. Page, 297 Fed. 644) while the lower court in this case found

that the Higgins product and Respondent's product were identical. (R. 45, 69). Since they were identical, Respondent was entitled to the same protection by a court in Florida as had been extended to the Higgins Co. by a court in Rhode Island and the District of Columbia.

(b) It did not contain the specified statutory ingredients.

(1) Vegetable Fats Are Not Included Under the Law

It is the contention of Respondent that regardless of the action of the Commissioner, its product could not be taxed under the present law, or regulations because its product was composed only of cocoanut and peanut oils which are not ingredients named in the law.

We disagree with the statement of petitioner (Brief, 11) that the record is, "not in proper condition to permit of a final decision of the taxability of respondent's product," for the reason that the question of fact as to imitation and semblance has been decided and the evidence presented proved an absolute absence of statutory ingredients.

Section 2 of the Act defines oleomargarine. It provides:

> "Sec. 2 Act of August 2, 1886 (24 Stat. 209) as amended by Acts of May 9, 1902.—That for the purposes of this act certain manufactured substances, certain extracts and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known and designated as 'oleomargarine', namely: All substances heretofore known as oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and neutral; all mixtures and compounds of oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine and neutral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow, beef fat, suet, lard, lard-oil, vegetable-oil annatto, and other coloring matter, intestinal fat, and offal fat made in imitation or semblance of butter, or when so made, calculated or intended to be sold as butter or for butter."

This is the wording of the original law as filed in the archives of the Secretary of State, as printed in the Statutes at large, and every revision of the law.

It will be readily seen that it names certain substances, i. e. substances **heretofore** known, as, oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine and neutral. These are all animal fats, or more strictly speaking, fats of hogs or cattle. The next clause covers all mixtures and compounds of these same substances, naming them. It then names extracts of lard and tallow. Next, mixtures and compounds of certain animal fats specifically named, i. e. tallow, beef fat, suet, lard, lard-oil, intestinal fat, and offal fat, all of which are animal ingredients, and then names "vegetable-oil annotto, and other coloring matter," which is the artificial coloration against which the law is directed. Appellant would attempt to have this court sanction its right to insert a comma in the law which is not in the law and thereby make taxable a vast number of products, the principal ingredient of which, coconut oil, was unknown as a food until thirty years after the passage of the law. It is very evident from an examination of the debates in Congress when the original law was being considered that cottonseed oil was used in 1886 as a softener for the animal fats named in the law, that sesame oil was used to give the product a gloss and that peanut oil was known as having been used and it may be presumed that if the lawmakers had intended their presence in a product to make it taxable they would have named them with the same particularity that they did the animal ingredients.

When the law was first enforced and before science had so far developed the processes of refining vegetable oils so that they might be used to any extent the Revenue Department's contention was that under the law they were foreign to the product. Judge Brown took this into consideration in his decision in the case of Higgins vs. Page, 297 Fed. 644, at the bottom of page 647, where he quotes from the argument of the Solicitor General in the case of Moxley vs. Hertz, 216 U. S. 344, as follows:

"The true distinction between natural and artificial colorants is unconnected with the statutory enumeration and must be discovered in the real nature of oleomargarine itself as universally recognized and not altered by statute, or in the natural relation of the colorant to the end (butter color) sought to be accomplished. By this test, oleomargarine is an article manufactured from animal fats; and a vegetable oil is a foreign, and so artificial, addition to it just as much as if it were not named in the statute . . . . . The only ingredients which can be considered natural to oleomargarine are the animal (including butter) fats, and the only natural colorant is butter itself."

Judge Brown did not believe the law included other than animal ingredients. This is shown by his statement on page 650 of the opinion as follows:

"While I doubt whether the statute should be given a construction which includes compounds free from animal fats, a decision of this question seems unnecessary for the disposition of this case, for the reason that according to the preponderance of the evidence, the plaintiff's product, Nut-Z-All, is 'not made in imitation or semblance of butter, or, when so made, calculated or intended to be sold as butter or for butter.' This was the opinion of the Commissioner as stated in the foregoing letter of January 20, 1922, and seems to me the better opinion."

We submit that the statute as passed, as signed by the presiding officer of each House, and the President, as filed in the archives of the Secretary of State, as published in the Statutes at Large, the Revised Statutes and every official revision for forty years should prevail against the effort of the Revenue Department to insert a mark on its own initiative. The very fact that Congress has through three sessions endeavored to pass a law in which these oils would be taxable should be at least persuasive on that point.

Extract of report of the Committee on Agriculture submitted to Congress on May 11, 1928, in this regard states:

"In line 18 of the printed bill a comma has been added between the term 'Vegetable oil' and the word 'annatto.' This is to correct a situation which arose because in the engrossed copy of the act of 1886 as amended this comma was omitted.

Neither the original engrossed bill, the original print, and the engrossed law as signed by the presiding officer of each house and the President of the United States contains this comma, and the comma is found nowhere except in the prints made by the Revenue Department. That Department endeavored to amend the law by arbitrarily inserting this comma and thereby making taxable a large group of food products unknown at the time of the passage of the law. There would be as much reason for the Department to insert a comma between the word "peanut" and "butter" in the recent tariff law imposing a duty on imported "peanut butter," and by so doing put a duty on both "peanuts" and "butter."

When a law is passed, certified, signed, and filed, it must, as to form be conclusive. As authority for this we refer the court to its opinion in the case of **Clark vs. Field, 143 U. S. 649,** where the matter is fully reviewed and the rule which has ever since governed, set out, after which the court says:

"We are of opinion, for the reasons stated, that it is not competent for the appellants to show, from the journals of either House, from the reports of committees or from other documents printed by authority of Congress, that the enrolled bill, designated 'H. R. 9416,' as finally passed, contained a section that does not appear in the enrolled Act in the custody of the State Department."

"An enrolled bill on file in the office of the Secretary of State must be accepted without question by the courts as having been regularly enacted by the Legislature."

State vs. Jones, 6 Wash. 452, 23 L. R. A. 340, in note gives rules of various states and England.

The field case has been approved many times by this Court. In Harwood vs. Wentworth, 162 U. S. at p. 558.

Again in 1901 in the case of Chesapeake & Potomac, etc., vs. Manning, 186 U. S. at p. 245, it is said:

> "The signing by the Speaker of the House of Representatives, and by the President of the Senate, in open session, of an enrolled bill, is an official attestation by the two Houses of such bill as one that has passed Congress. It is a declaration by the two Houses, through their presiding officers, to the President, that a bill, thus attested, has received, in due form, the sanction of the legislative branch of the government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass Congress shall be presented to him. And when a bill, thus attested, receives his approval, and is deposited in the public archives, its authentication as a bill that has passed Congress should be deemed complete and unimpeachable."

There is a very grave doubt that Congress ever intended to tax any ingredient other than animal fats and oils.

We wish to remind the Court of a principle of law which has, because of its constant reiteration, becomes a legal axiom. It is that being a revenue law, it must be construed most favorably in behalf of the taxpayer. This is precisely set out in U. S. vs. Merriam, 263 U. S. 186, at p. 188, as follows:

> "But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer. Gould v. Gould, 245 U. S. 151, 153, 62 L. Ed. 211, 213, 38 Sup. Ct. Rep. 53."

In Hartranft v. Wiegmann, 121 U. S. 609, at 616, this Court said:

> "We are of opinion that the decision of the circuit court was correct. But, if the question were one of doubt, the doubt would be resolved in favor of the im-

porter 'as duties are never imposed on the citizen upon vague or doubtful interpretations.' Powers v. Barney, 5. Blatchf, 202; U. S. v. Isham, 84 U. S., 17 Wall. 496 (21: 728, 730); Gurr v. Scudds, 11 Exch. 190; 191; Adams v. Bancroft, 3 Sumn. 384."

To correctly interpret the statute it is necessary to ascertain conditions and conceptions at the time the statute was passed. This is especially true in this case which limits the definition to certain "substances" that were "heretofore" known by certain names. The case of **Brawn and Fitts vs. Coyne, 125 Fed. 331,** by the Circuit Court, Northern District of Illinois, decided January 30, 1899, in passing upon this statute stated:

> "Oleomargarine is usually made of leaf lard, and beef fat churned in milk and cream, or milk, cream and butter, to give it flavor, and colored **with vegetable dye annatto** * * * The tax practically is upon the product of such manufacturers of leaf lard, beef fat, etc., as are made in the conscious imitation of butter. The purpose of Congress was to protect butter, as it has commonly been known against outside competitors, under the guise or appearance of butter. The test is this: Is the product a conscious imitation of butter? In my opinion, it is not taxable under the Oleomargarine Law. The fact that it is put up in one pound packages does not make it a conscious imitation of butter. The manufacturers of butter have no monopoly upon the commercial expedient of one pound packages."

In the case of Com. vs. Van Dyke, 9 Penna. Dist. 41, decided Jan. 17, 1900, the court in describing oleomargarine said:

> "A substance resembling it (butter) is now obtained from the fat of domestic animals and is called oleomargarine, a new word coined for the purpose."

This description is made just preceding the quotation of oleomargarine as set out in the Act of Aug. 2, 1886, Sec. 2.

In **State vs. Packing Co., 124 Iowa at 328,** the court in June, 1904, said:

"Remembering that oleomargarine is a manufactured product made of oleo oil, neutral, lard, milk and cream, and pure butter, although pure butter is not used in all grades and that butter and milk and cream or other coloring matter is evidently used for the purpose of giving it the semblance of butter, etc."

(2) THE TREASURY DEPARTMENT AND CONGRESS BOTH ADMIT THAT THE LAW DOES NOT TAX RESPONDENT'S PRODUCT.

On July 10, 1930, the President signed a law inserting a comma between the words "vegetable-oil" and "annatto" and including fish oil and fat and all products containing more than 1% moisture. This law as shown by Committee reports and statements of its sponsors was particularly designed to make taxable such products as Southern Nut Product. Congress delayed the taking effect of said law until July 10, 1931, solely for the protection of Respondent and others engaged in similar business. The Revenue Department however refuse to recognize this law and allow respondent, to continue its business until the effective date of such act, but persisted in prematurely closing such business by asserting the tax prior to the date allowed by Congress.

The author of the bill, Mr. Haugen, Cong. Rec. Feb. 1, 1930, H. R. p. 2996, in presenting the bill to the House of Representatives said:

"The purpose of the bill is simply to bring under the definition of oleomargarine a new arrival, another substitute for butter and oleomargarine. The aim of the proposed bill can be readily understood; it is so plain that he who runs may read. What is it! It is simply to do away with the practice of permitting the manufacture and sale of a certain product, as has been stated, composed of ingredients produced outside the continental limits of the United States. Briefly speaking, the purpose of the proposed bill is simple and readily understood. Its purposes is to do away with an unjust practice, and to permit the manufacture and sale of one product, the

so-called cooking compounds, scot free of tax and regulation, over another taxed product subject to Federal sanitary regulations and to remove the discrimination in favor of one product composed of ingredients produced outside of the continental limits of the United States, as against products composed of ingredients produced within the United States. In other words, to do away with an apparent rank injustice to worthy and legitimate domestic industry, the cotton seed industry and the dairy industry of our country.

"Recently a new substitute for butter and oleomargarine has been placed upon the market in the United States—sold in large quantities throughout the country—disguised and sold under numerous and various names, and generally referred to as cooking compounds, made largely from coconut oil, imported from outside the continental limits of the United States, mixed with a small portion of peanut oil, salted, and colored, sold in pound, half-pound, and quarter-pound packages of the same size and appearance as butter and oleomargarine. The so called cooking compounds are largely made of the same materials as oleomargarine, except that they are mixed and emulsified in water instead of in milk or cream.

In the report of the Committee on Agriculture on this bill, it is said:

"This bill repeats and reenacts into law, section 2 of the act approved August 2, 1886, as amended, which act defines butter and oleomargarine and provides for taxation of adulterated butter and oleomargarine and the conditions under which these products may be made and sold, with a number of changes for the purpose of making this statute fit conditions in the butter and oleomargarine industry brought about by the discovery of new processes and materials, and by changes in methods of manufacturing. * * * * .

The purposes of the amendment, in addition to clarifying the language of the act and including the fish oils and fats, as above briefly mentioned, is to bring a third class of fat compounds, in addition to the two specifically

enumerated in the existing law, within the definition of oleomargarine, and therefore within the taxing and regulating power of the Bureau of Internal Revenue. * * * *

These so-called cooking compounds, made in this manner, are not clearly within the definition of oleomargarine as it is stated in the present law, and as this law is interpreted by the courts. * * *

The evidence before the committee shows that the definition of oleomargarine in the present law is not sufficiently comprehensive to cover the fat and oil compounds that can and are being made to be so nearly like oleomargarine as to mislead the buying public. This is the purpose of the existing law. * * * *

Your committee realized that the distinguishing purpose of the oleomargarine law was to prevent the sale of adultered butter as real butter, and of oleomargarine as butter; that is, the protection of the public from fraud and misrepresentation. * * *

We believe that the primary purpose of the act of August, 1886, namely, to protect the public from fraud and substitution of an inferior product in place of butter is being defeated by the manufacture and sale of these so-called cooking compounds without license, restriction, or regulation. The public is entitled to protection from fraud and substitution of an inferior product for oleomargarine as well as of such product for butter."

The sponsor of the bill in the House, Mr. Purnell, in his request that the bill be passed, said (H. R. Jan. 31, 1930, p. 2907, 8):

"Mr. Speaker, ladies and gentlemen of the House, the resolution which I bring here by direction of the Committee on Rules, House Resolution 133, if adopted, will make in order H. R. 6, which is known to the membership of the House as the oleomargarine bill. The purpose of the bill, broadly stated, is to bring within the purview of the oleomargarine law certain cooking compounds which

have been manufactured and developed within the last few years and which are not now under the regulations of the oleomargarine act. * * *

The oleomargarine act, which this bill will amend, was passed in 1886. The purpose of the original oleomargarine act was to protect the public against adulterated butter and against the sale of oleomargarine as butter. * * *

Since the passage of the oleomargarine act there has come into existence in the country a new butter substitute branded as a cooking compound, but which to all intents and purposes is intended to be and is sold as butter. These new cooking compounds, which we seek to bring within the purview of the oleomargarine law and under its provisions, are made principally of coconut oil, perhaps 80 per cent coconut oil, and the balance peanut oil, salt, and water. They are made in the identical manner as oleomargarine with this exception: Oleomargarine is emulsified in milk or cream, whereas these cooking compounds are emulsified in water. The ordinary cooking compounds which are known to the housewives of the country generally, such as lard, Crisco, and so forth, have about 1 per cent or less of moisture, while these cooking compounds have from 10 to 15 per cent of moisture. * * * * Let me remind the ladies and gentlemen of the House that the manufacturers of these cooking compounds are under no restriction whatever. They pay no tax. The Government has no supervision over the manufacture of their product and imposes no obligations upon them."

Senator Norbeck, who sponsored the law in the Senate said (Senate Record May 22, 1930, p. 9731):

"This measure is intended to deal with a situation which has developed quite recently—that is, there have been so many forms of butter substitutes coming on the market that their sale amounts to what is almost a fraudulent practice. The bill does not propose to change the present law as to oleomargarine, the main features of which were adopted more than 40 years. * * * A large

business has developed in these substitutes, which differ just enough from oleomargarine to escape the requirements of the law, and thereby avoid the tax."

The Commissioner of Internal Revenue **himself** recognized that these substances are not taxable and in a letter to Senator Norbeck, May 26, 1930, (Senate Record 26, 1930, p. 9930) said:

> "Bill H. R. 6 was drafted to bring these so-called cooking compounds within the definition of oleomargarine as provided in the act of August 2, 1886, as amended by the act of May 9, 1902, and thus avoid the multiplicity of law suits and conflicting court decisions with which the Government was threatened in every attempt made to hold such products subject to the oleomargarine law."

On January 10th, 1930 Commissioner of Internal Revenue Lucas wrote a letter to Congress (Cong. Rec. Feb. 1, 1930, p. 2999) recommending the passage of a law covering these products saying:

> "In view of the injunction granted the Higgins Manufacturing Company of Providence, R. I., by the District Court of Rhode Island, enjoining the collector from collecting tax on their product manufactured from vegetable oils, salt, water and artificial coloring, no attempt has been made to assess stamp tax on Higgins Nut Product or to require the payment of special tax by dealers selling the same.
>
> "The Standard Nut Margarine Co., of Jacksonville, Fla., was recently granted a temporary injunction by the United States District Court at Jacksonville, Fla., restraining the collector of internal revenue for this district from the collection of stamp tax upon the manufacture of the plaintiff's Southern Nut Product and from special tax upon its sale at wholesale and re[illegible]. It is understood that this case has been set for trial under date of February 24, 1930.
>
> "In al[illegible]bability numerous other injunction proceedings [illegible]e instituted restraining the collection

"Why pass this act, if it was previously the law? This question was asked by Mr. Justice Strong, in Bath County v. Amy, 13 Wall. 249, 20 L. ed. 539, in discussing the eleventh and fourteenth sections of the Judiciary Act of 1789 (Act Sept. 24, 1789, c. 20, 1 Stat. 78, 81), where it was insisted the power to issue certain writs was given by Section 11, and wherein by said Section 14 that power was expressly granted, and he inquires:

> 'Why make this grant if it had been previously made in the eleventh section?'

"Had the Attorney General been authorized to appoint and commission special assistants to the district attorneys, with authority to conduct proceedings before the grand juries of the country, the Act of June 30, 1906, would not have been passed. There would have been no need for it. It seems needless to add that, if the contention of counsel for the government as to the law prior to the passage of the Act of June 30, 1906, is correct, that act would be but declaratory thereof, and it would in no way affect it, The Court, however, does not agree with counsel for the government in the contention that the act of June 30th was the law prior to that date. It follows therefore that the Court is of the opinion that the Attorney General of the United States was not authorized by law to confer upon the special assistants to the district attorney the right to conduct investigations before the grand jury, as was done in this case, and that Messrs. Sanford and Graves were improperly before the grand jury under the facts stated herein above."

In Fairbanks v. U. S., 181 U. S., at p. 308,, it is said:

> "If there were doubt in reference thereto the practical construction placed by Congress of the statute was sufficient to remove the doubt."

In Welch v. Cook, 97 U. S. 541, it is said:

> "We are to presume that Congress knew that as the law stood on the 20th. of June, 1874, the property in the district was liable to taxation with certain exceptions, and that it knew of what the exceptions consisted. We are

also to presume that it appreciated the effect of its action when it took upon itself anew the duty of fixing the subjects of taxation."

In U. S. v. Gilmore, 8 Wall, 330, it is said:

"A construction by the Legislature is entitled to greater weight than one by the Executive."

With respect to this point, the court below said (R. 82, 3):

"The product which was the subject of that threatened exaction, a mixture or compound consisting of cocoanut oil, peanut oil, salt, water, and harmless coloring matter, was not in existence until long after the enactment of the oleomargarine act. It was not made in imitation or semblance of butter, and was not a mixture or compound described in section 2 of that act (26 U. S. C. A. Paragraph 541), which covered no mixture or compound containing any vegetable ingredient other than 'vegetable oil annatto,' which is a dyeing or coloring material used for coloring butter, cheese, etc. Nothing in that statute indicated an intention to tax such a mixture or compound as plaintiff's Southern Nut Product, or that the lawmakers, in enacting that statute, contemplated the possibility of such a mixture or compound being devised and coming into competition with butter."

"We think it would be a manifest perversion of the statute in question to permit it to be made the means of enabling a tax official to obtain exemption from being restrained from enforcing an exaction which no legislation purports to provide for."

VII.—CONCLUSION

We therefore submit that there exists in this case such exceptional and extraordinary circumstances as to create an exception to Sec. 3224 R. S. and that the District Court committed no error when it granted the injunction and that the Circuit Court of Appeals properly sustained the decision of the lower court.

Respectfully submitted,

GEORGE N. MURDOCK,
140 So. Dearborn St., Chicago, Ill.

A. Y. MILAM,

E. T. McILVAINE,

ROBERT R. MILAM,
Jacksonville, Florida.

Solicitors for Respondent.

CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 252

JOSIAH T. ROSE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF GEORGIA, PETITIONER

vs.

THE STANDARD NUT MARGARINE COMPANY OF FLORIDA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 22, 1931
CERTIORARI GRANTED OCTOBER 19, 1931

SUPREME COURT OF THE UNITED STATES

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JOSIAH T. ROSE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF GEORGIA, PETITIONER

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of stamp and special taxes upon the manufacture and sale of these so-called colored cooking compounds, and while the bureau is of the opinion that they are unquestionably made in imitation or semblance of butter and should be subject to the tax imposed under the oleomargarine law, the only satisfactory solution of the problem appears to be through legislation, such as the passage of H. R. 10958, Seventieth Congress, first session, which specifically brings such products within the classification of oleomargarine.

Very truly yours,

Robt. H. Lucas, Commissioner."

The report of the Senate Committee on Agriculture and Forestry, by Senator McNary, quotes a report of the Secretary of the Treasury, where it is said:

"The proposed legislation is designed to bring within the taxing and regulatory provisions of the act mentioned certain substances or mixtures which are now being manufactured and placed on the market as colored cooking compounds."

While the opinion of the Legislative body is not binding upon the courts it certainly is persuasive and entitled "to great weight in assisting a court when in doubt." (U. S. v. Stafoff, 260 U. S. 277, at 280).

This question was before the Court in U. S. v. Virginia-Carolina Chemical Co. 163 Fed. 66, at 74:

"It is to be regretted that this Court cannot follow the holdings in the Cobban and Twining Cases, but is constrained to hold that no authority existed at or before the finding of this indictment authorizing the Attorney General of the United States to issue a commission that would, with the sanction of law, authorize special assistants to the United States Attorney to appear before and participate in the proceedings of a grand jury, as was done in this case. The Congress of the United States so

understood the law to be at that time. On June 30, 1906 (more than a month after the indictment was found), it was enacted as follows:

> 'That the Attorney General or any officer of the Department of Justice, or any attorney or counsellor specially appointed by the Attorney General under any provision of law, may, when thereunto specifically directed by the Attorney General, conduct any kind of legal proceedings, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which district attorneys now are or hereafter may be by law authorized to conduct, whether or not he or they be residents of the district in which such proceeding is brought.
>
> "Approved June 30, 1906."
> Act June 30, 1906, c. 3935, 34 Stat. 816 (U. S. Comp. St. Supp, 1907, p. 44).

"Here we have Congress, after this indictment was found, enacting a law authorizing the Attorney General to do the very thing that was attempted to be done in this case; that is, appoint special assistants to the district attorneys to assist him in discharging their duties in grand jury proceedings. Mr. Gillet, of the House Judiciary Committee, reported the bill from that committee, and therein said:

> 'As the law now stands, only the district attorney has any authority to appear before a grand jury, no matter how important the case may be, and no matter how necessary it may be to the interests of the government to have the assistance of one who is specially or particularly qualified by reason of his peculiar knowledge and skill, to properly present to the grand jury the question being considered by it.'

"He understood, and Congress understood, that at that time only the district attorneys had authority to appear before a grand jury, no matter how important the case may be.

and firms located outside of the State of Florida where the product is manufactured, and sells and ships said product to a great number of firms and persons (too numerous to be set forth herein), located in many States of the United States outside of the State of Florida.

6. Plaintiff further states that it has engaged in the manufacture of Southern Nut Product at the location heretofore mentioned for three years, and maintains and operates a plant and offices in the said city of Jacksonville for the conduct of said business; and that in carrying on said business it has built up a reputation and standing for fair and honest dealing with its customers and others with whom it has done business.

7. Plaintiff further states that prior to engaging in the manufacture and sale of said Southern Nut Product, an action at law had been brought against one Page, a collector of internal revenue of the United States for the district of Rhode Island, for the purpose of recovering from said collector taxes paid under protest by the Higgins Manufacturing Company on a product manufactured and sold by that company know as Nut-Z-All, which product was manufactured in the same way and of the same ingredients as Southern Nut Product is manufactured by plaintiff herein, and that after hearing the evidence submitted on behalf of both plaintiff and defendant, it was held by the court that the said product Nut-Z-All was not made in imitation or semblance of butter, nor when so made calculated or intended to be sold as butter or for butter—and hence under the law was not oleomargarine and not taxable as oleomargarine. For the convenience of this court, said decision may be found in volume 297 of the Federal Reporter at page 644.

4 8. Plaintiff further states that as a result of said decision, Andrew W. Mellon, Secretary of the Treasury of the United States, approved, and David H. Blair, then Commissioner of Internal Revenue of the United States, published and promulgated Treasury Decision 3590, which was the text of the above decision, and further informed all concerned that Nut-Z-All had been held by the court not to be oleomargarine and not taxable as oleomargarine.

9. Plaintiff further states that in June, 1924, an organization or association of oleomargarine manufacturers known as the Institute of Margarine Manufacturers, maintaining headquarters in Washington, D. C., made inquiry of the said Commissioner of Internal Revenue, David H. Blair, and Deputy Commissioner of Internal Revenue, R. M. Estes, as to the taxability of the said product Nut-Z-All, and that the said Estes made reply as follows:

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, August 20, 1924.

NUT-Z-ALL

INSTITUTE OF MARGERINE MANUFACTURERS,
J. S. ABBOTT, *Secty.*,
1049 Munsey Building, Washington, D. C.

SIRS: Reference is made to your letters of June 18 and July 30, 1924, relative to the alleged advertisements and sale of Nut-Z-All by certain retailers as butter and as a substitute for butter, and requesting this office to take steps to bring the product within the classification of oleomargarine.

The product Nut-Z-All was held by this office taxable as oleomargarine but the decision was contested in the case of Higgins Manufacturing Company v. Page, 297 Fed. 644, wherein this product was held by the court to be not made in imitation or semblance of butter and not taxable as oleomargarine. The court having held the product to be not taxable as oleomargaine, the fact that retailers advertise and sell it as butter, or as a substitute for butter, would not render them or the manufacturers liable under the internal revenue law.

It is likely that the practice about which you complain is in violation of the statute of the States in which Nut-Z-All is being sold, and you may be able to obtain relief desired by applying to the State officials.

Respectfully,

(Signed) R. M. ESTES,
Deputy Commissioner.

MLN

10. Plaintiff further states that on April 1, 1927, said Andrew W. Mellon and David H. Blair, notwithstanding the aforesaid decision in the case of Higgins Manufacturing Company v. Page, the issuance of said Treasury Decision 3590 based thereon, and the statement contained in the above letter to the said Institute of Margarine Manufacturers that the said product Nut-Z-All was not taxable as oleomargarine, all of which were given extensive publicity throughout the trade, endeavored by Treasury Decision 4006 to again declare products similar to Nut-Z-All taxable as oleomargarine if colored to look like butter.

11. Plaintiff further states that in July, 1927, the said Higgins Manufacturing Company, of Providence, Rhode Island, filed in the United States District Court, District of hode Island, a petition for a temporary injunction against Frank A. Page, collector of internal revenue for the district of Rhode Island, asking the court to restrain the said collector of internal revenue from collecting a tax on Nut-Z-All and similar products as on oleo-

margarine, which injunction was granted by his honor, Judge Lowell, of the district of Massachusetts on July 18, 1927, said injunction being in words and figures as follows:

District Court of the United States, District of Rhode Island

HIGGINS MANUFACTURING COMPANY,

vs.

FRANK A. PAGE, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE for the Collection District of Rhode Island, et al.

The President of the United States of America—

To: Frank A. Page, individually and as collector of internal revenue of the United States for the collection district of Rhode Island, and his deputies, agents and successors,

Greetings:

Know ye, that in the above-entitled cause a motion for the issuance of a writ of preliminary injunction has been duly made, and the said motion, upon due consideration, has been granted by the court and such injunction ordered to issue:

Now, therefore, you are hereby restrained and enjoined, pending the hearing and determination of this cause, or until the further order of this court, from collecting, or attempting to collect from plaintiff any pretended tax or imposition purporting to be levied or assessed against the plaintiff under said oleomargarine act (act of August 2, 1886, chapter 840, 24 Stat. L. 209—as amended by act of May 9, 1902, chapter 784, sec. 332, Stat. L. 194) on account of the manufacture and sale of Higgins Nut Product; from
7 seizing any of the property of the Higgins Manufacturing Company because an alleged tax of ten cents per pound on Higgins Nut Product has not been paid thereon; from distraining, seizing, entering upon, or attaching, or commencing any forfeiture proceedings against the property of the plaintiff because an alleged tax of ten cents per pound on Higgins Nut Product has not been paid; from enforcing any of the remedies provided for the collection of internal revenue of the United States against the plaintiff, its property, officers, or agents and from notifying wholesale or retail dealers dealing in Higgins Nut Product in the collection district of Rhode Island that they will incur liability to a specific tax as dealers in artifically colored oleomargarine or from making public announcement that Higgins Nut Product is liable to a tax imposed on colored oleomargarine or that said product will be seized.

Witness my hand and the seal of the District Court of the United States for the District of Rhode Island at Providence, this 23rd day of July, A. D. 1927.

[SEAL] (Signed) ALICE PECKHAM, *Clerk.*

That at the time of granting said injunction Judge Lowell rendered an opinion, which for the information of this court may be found in 20 Fed. (2d), at p. 948.

12. Plaintiff further states that in July, 1927, the Baltimore Butterine Company, of Baltimore, Maryland, petitioned the Supreme Court of the District of Columbia for a temporary and permanent injunction against said Blair and Estes, to restrain them from endeavoring to enforce said Treasury Decision 4006 against
8 its nut product Nu-Ine, which was identical in content and appearance with plaintiff's Southern Nut Product and which was in content and appearance identical with Nut-Z-All. After hearing and due consideration, Justice Jennings Bailey of that court granted an injunction pendente lite, and rendered an opinion which is in words and figures as follows, to-wit:

"I agree with the reasoning of the decision of Judge Lowell of the District Court of Rhode Island in Higgins Manufacturing Co. v. Page, that is one of the cases to which the Supreme Court referred in Dodge v. Brady, 240 U. S. 122, of extraordinary and exceptional circumstances.

"The bill alleges that the substance Nu-Ine involved in this case is the same as Nut-Z-All which Judge Brown of the district court held not subject to taxation under the oleomargarine act. Yet in spite of this judicial holding the defendant has attempted by a regulation to make all substances like to that involved in this suit, taxable under the act. It is clear that the defendant by means of a mere regulation can not enlarge the provisions of the act, and such a regulation can not be enforced. There would be no end to litigation if the defendant should persist in levying a tax after the courts have held the tax invalid, and the injury to the plaintiff would be irreparable and the amount inascertainable.

"The injunction will issue as prayed, restraining, pendente lite, the defendant from enforcing Treasury Decision No. 4006, in so far as it may apply to Nu-Ine."

On December 16, 1927, the same court, by Justice A. A. Hoehling, made said injunction permanent, the final decree being in words and figures as follows:

9 Final Decree

In the Supreme Court of the District of Columbia Holding an Equity Court

The Baltimore Butterine Company, a corporation, plaintiff,

versus

Andrew W. Mellon, Secretary of the Treasury; David H. Blair, Commissioner of Internal Revenue; R. M. Estes, Deputy Commissioner of Internal Revenue, defendants.

This cause coming on for final hearing, the plaintiff moved that, upon the pleadings and law applicable, the injunction pendente lite heretofore issued be made permanent, thereupon counsel for both sides having been heard and the matter having been considered by the court,

It is, this 16th day of December, A. D. 1927, adjudged, ordered, and decreed that the injunction pendente lite heretofore issued in this cause be, and the same hereby is made permanent.

By the court,

A. A. HOEHLING,
Associate Justice.

In December, 1927, Judge Lowell made permanent the temporary injunction theretofore granted against the said Frank A. Page, collector of internal revenue for the district of Rhode Island, as set out above. No appeals were taken by the Government from any of the above-mentioned decrees.

13. Plaintiff further states that, relying upon the said first decision in the case of Higgins v. Page, said Treasury Decision
10 3590, said letter of R. M. Estes, and the said injunctions set out above, it was warranted in believing that the question had been judicially determined, and that such products were not oleomargarine and not taxable as such, and it therefore engaged in the manufacture of Southern Nut Product. To further safeguard its business, however, plaintiff made inquiry of the Bureau of Internal Revenue and was advised by letter that Southern Nut Product would not be taxable as oleomargarine. Said letter read in part as follows:

"The Standard Nut Margarine Company has the same privilege of making a compound of the kind in question without tax-paying the same as oleomargarine as is being enjoyed by those manufacturers who obtained favorable decisions from the courts."

Upon receiving this letter, plaintiff began the manufacture of Southern Nut Product and has continued its manufacture in the same manner and of the same ingredients.

14. Plaintiff further states that on or about May 13, 1929, the Hon. William H. Barrett, United States district judge for the southern district of Georgia, in a case involving the question whether Southern Nut Product was an imitation of butter, decided that it was not an imitation of anything, saying:

"It must be borne in mind throughout that this article when placed in the streams of commerce by its manufacturer and when purchased by the consumer had nothing on its container to indicate that it was an imitation of anything, and certainly not of creamery butter. Instead of by implication or otherwise claiming to be the product of milk or cream it is affirmatively in its name indicated that it was derived from 'nut.' Not only did its name thus affirm-
11 atively indicate that it was no imitation of creamery butter but in extenso the words on the carton declared, 'This product is made from the very best vegetable fats and can not be excelled for cooking, baking, and shortening.' The alleged elements of imitation are (a) it is in square cartons containing one pound, (b) the pound is divided into four quarter-pound cubes and (c) it is colored exactly like creamery butter. It hardly can be contended that an article of food should not be sold in pound packages because some other article of food was sold in pound packages and it could hardly be contended that the adoption of the plan of dividing a pound of food into four cubes preempted such practice as against all other food producers, and it can hardly be contended that the color of creamery butter, even though it were always the same (contrary to the evidence), would preempt it as against all other foods of such color. It does not appear in the 'conclusion' nor was it urged at the hearing, that there was any reason for any purchaser of a carton of Southern Nut Product to be deceived into thinking that it was creamery butter. Apparently the defendant and Attorney General dealt with this as a package, for the language of the finding is that 'it is an imitation in package of another substance.' It is at least doubtful whether the sale in packages of a substance manufactured and put into commerce so marked as to prevent any reasonable conclusion that it was intended as an imitation of another article of food would come under the ban of this act because perchance some purchaser might, either as purchased or in some other way, use it either as an imitation of or as a substitute for another article of food."

Plaintiff further states that on or about November 1, 1929, one Peter Miller, collector at Jacksonville, Florida, at the instance of and under the instructions of the Commissioner of Internal Revenue, undertook to collect a tax of 10 cents per pound on
12 the manufacture of Southern Nut Product as upon the manufacture of artificially colored oleomargarine, and to require the wholesalers and retailers of said product to pay the special license fees of $480.00 and $48.00 per annum, respectively. That plaintiff filed a petition for injunction against such action on the part of said collector.

15. Plaintiff further states that on or about March 4, 1930, Hon. Lake Jones, of the United States District Court for the Southern District of Florida, granted a permanent injunction against said collector, as follows:

In the District Court of the United States For the Southern District of Florida, Jacksonville Division

THE STANDARD NUT MARGARINE COMPANY OF FLORIDA, A CORPORATION, plaintiff,

vs.

PETER H. MILLER, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE for the District of Florida, defendant

In Equity No. 651–J

Final Decree

This cause having come on for final hearing and court having heard the evidence, and being duly advised of its judgment in the premises; it is

Ordered, adjudged, and decreed as follows:

1. The equities of this cause are with the complainant and against the defendant, and complainant is entitled to the relief prayed in the bill of complaint.

2. The court finds that the complainant has established the material allegations of the bill of complaint.

13 3. It is ordered that the temporary injunction granted in this cause under date of January 7th, A. D. 1930, be and the same is hereby made permanent and that said defendant, Peter H. Miller as collector of internal revenue for the district of Florida, be and he is hereby permanently restrained and enjoined as in said temporary injunction said defendant was heretofore enjoined.

Done and ordered at chambers at Jacksonville, Florida, this March 4th, A. D. 1930.

LAKE JONES, *District Judge.*

16. Plaintiff further states that thereafter on or about April 15th, 1930, defendant herein at the instance of and under the instructions of the said Commissioner of Internal Revenue, issued orders to his deputies to require all wholesale and retail dealers in the State of Georgia to pay special license taxes because of their sale of Southern Nut Product, as required by law upon the sale of oleomargarine. Defendant, through his agents and deputies, has asserted his intention of requiring the payment of this special oleomargarine tax by every wholesale and retail dealer who handles Southern Nut Product in the State of Georgia, and further to proceed in an effort against said dealers to collect penalties for failure to pay such licenses.

17. That said taxes are so great that rather than pay them said wholesale and retail dealers are threatening to discontinue and unless the relief prayed for herein is forthwith granted will discontinue the business of dealing in Southern Nut Product, and plaintiff's entire business in the State of Georgia will be ruined and destroyed. That such damage and injury is immediate and irreparable, and plaintiff has no adequate remedy at law, and that for said dealers to themselves pay the said taxes and bring actions at law to recover would necessitate a multiplicity of suits.

18. Plaintiff further states that the attempt of defendant herein to tax the dealers of Southern Nut Product as dealers of artificially colored oleomargarine will deprive plaintiff of its property without due process of law, as guaranteed by the Constitution of the United States.

19. Plaintiff further states that section 2 of the act of August 2, 1886, as passed by Congress, is as follows:

"SEC. 2 (act Aug. 2, 1886). That for the purposes of this act certain manufactured substances, certain extracts, and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known and designated as 'oleomargarine' namely: All substances heretofore known as oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and neutral; all mixtures and compounds of oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and neutral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow beef fat, suet, lard, lard-oil, vegetable oil annatto, and other coloring matter, intestinal far, and offal fat made in imitation of semblance of butter, or when so made, calculated, or intended to be sold as butter, or for butter."

20. Plaintiff further states that Southern Nut Product is composed entirely of vegetable oils, salt, water, and harmless coloring matter, the same as the products Nut-Z-All and Nu-Ine, there being no element of animal nature contained therein. That under the provisions of section 2 of the said act of August 2, 1886, as passed by Congress, only animal elements were included in the definition of oleomargarine; and that the act of defendant in attempting to make taxable products composed entirely of vegetable ingredients is not justified or authorized by said act.

Prayer

Wherefore, plaintiff, being without remedy in the premises except in a court of equity, prays:

1. That writs of subpœna issue directed to defendant herein commanding him to appear and make full, true, and complete answer to this the plaintiff's bill of complaint, but not under oath, his said answer under oath being expressly waived, and to abide by and perform such order or decree as the court may make in the premises.

2. That defendant, his agents, assistants, deputies and employees be temporarily restrained from directly or indirectly collecting, or attempting to collect, from any dealers selling plaintiff's product, Southern Nut Product, any pretended tax or imposition purporting to be levied or assessed as special license taxes under the oleomargarine act (act of August 2, 1886, chapter 840, 24 Stat. L. 209—as amended by act of May 9, 1902, chapter 784, sec. 332, 32 Stat. L. 194) on account of the sale of the said product, Southern Nut Product, referred to in the petition herein; from seizing any of the property of plaintiff or said dealers because said alleged license taxes have not been paid; from distraining, seizing, entering upon, or attaching, or commencing any forfeiture proceedings against the property of plaintiff or said dealers because said special license taxes have not been paid; from enforcing any of the remedies provided
16 for the collection of internal revenue of the United States against the plaintiff, its said dealers, its property, officers or agents, with respect to said product, Southern Nut Product; from notifying wholesale or retail dealers in said nut product that because of the sale of the said nut product of plaintiff they will incur liability to a specific tax as dealers in artificially colored oleomargarine; and from asking public announcement that the said dealers in said nut product manufactured by plaintiff herein are liable to the taxes imposed on the sale of colored oleomargarine.

3. That upon the hearing of the application hereby made for a preliminary injunction, a preliminary injunction may be issued against the defendant, his agents, assistants, deputies, and employees, enjoining them, pending final hearing of this cause, from collecting, or attempting to collect, directly or indirectly, from the plaintiff, or any dealer selling plaintiff's product, Southern Nut Product, any pretended tax or imposition purporting to be levied or assessed against the plaintiff or said dealers under the oleomargarine act (act of August 2, 1886, chapter 840, 24 Stat. L. 209—as amended by act of May 9, 1902, chapter 784, sec. 332, 32 Stat. L. 194) on account of the manufacture or sale of the said product, Southern Nut Product, referred to in the petition herein and manufactured by plaintiff; from seizing any of the property of plaintiff herein or of said dealers because an alleged tax on the sale of said product, Southern Nut Product, manufactured by plaintiff has not been paid; from distraining, seizing, entering upon, or attaching, or commencing any forfeiture proceedings against the property of plaintiff or said dealers because any alleged tax has not been paid on the sale of said product, Southern Nut Product; from enforcing any of the remedies provided for the collection of internal revenue of the United States against plaintiff, its property, officers, or agent, of said dealers
17 with respect to the sale of said product, Southern Nut Product, from specific tax as dealers in artificially colored oleomargarine; and from making public announcement that the said nut product manufactured by plaintiff herein is liable to the tax imposed on colored oleomargarine.

4. That plaintiff have such other, further, and general relief as the nature of the case may require, and the court may deem just and proper in the premises.

STANDARD NUT MARGARINE CO. OF FLORIDA,
By W. E. NICHOLSON,
Secretary-Treasurer.
GEORGE N. MURDOCK,
JAS. C. DAVIS,
Attorneys for Plaintiff.

[*Duly sworn to by W. E. Nicholson. Jurat omitted in printing.*]

18 In United States District Court

Order to show cause

Filed May 2, 1930

Let this petition be filed and a hearing had at Atlanta on May 5, 1930, or so soon thereafter as the case can be reached the defendant now appearing and consenting to the hearing.

May 1, 1930.

SAM'L. H. SIBLEY,
U. S. Judge.

Acknowledgment of service

Service of the foregoing bill and order thereon is hereby acknowledged. Issuance of process is waived.

This May 2d, 1930.

C. P. GOREE,
Assistant U. S. Attorney and Solicitor for Defendant.

In United States District Court

Now comes the defendant, Josiah T. Rose, individually and as collector of internal revenue for the district of Georgia, and files these, his defenses, to the bill of complaint herein, reserving unto himself the benefit of all necessary objections and exceptions to the errors and insufficiencies of said bill and the jurisdiction of the court, nevertheless answering so much and such parts of the bill as he is advised it is material or necessary for him to answer, that is to say:

Motion to strike parts of plaintiff's bill

The defendant respectfully moves the court to strike from said bill paragraphs 7, 8, 9, 11, 12, 13, 14, and 15.

19 (a) Because said paragraphs do not furnish any basis for proper pleadings.

(b) Because the allegations contained in said paragraphs are argumentative, impertinent, immaterial, and irrelevant.

A [Caption omitted]

In United States District Court, Northern District of Georgia, Northern Division

THE STANDARD NUT MARGARINE COMPANY OF FLORIDA, A CORPORATION, plaintiff

vs.

JOSIAH T. ROSE, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE for the District of Georgia, defendant

In Equity No. 575

Bill of complaint

Filed May 2, 1930

Plaintiff states as follows:

1. The plaintiff, the Standard Nut Margarine Company of
2 Florida, is a corporation organized and existing under the laws of the State of Florida, with its principal office and place of business located at Jacksonville, Florida, and is a citizen of the United States of America and the State of Florida.

2. The defendant, Josiah T. Rose, is a citizen of the State of Georgia, and a resident of the city of Atlanta, Georgia, and is collector of internal revenue for the District of Georgia.

3. Plaintiff states that this suit arises under the Constitution and laws of the United States and involves the validity, construction, application and enforcement of the act of Congress of August 2, 1886 (24 Stat. 209), as amended by the act of May 9, 1902 (32 Stat. 193), known as the oleomargarine law.

4. That the suit involves property rights of plaintiff in excess of three thousand ($3,000.00) dollars, exclusive of interest and costs.

5. Plaintiff further states that it is engaged in the manufacture and sale in interstate commerce of a nut product known as Southern Nut Product, manufactured and sold under its own distinctive name, said name not being an imitation of the distinctive name of any other product; that said name is accompanied on the same label or brand with the name of the place where it is manufactured or produced; and that said product contains no added poisonous or deleterious ingredients. Southern Nut Product is a mixture or compound consisting of cocoanut oil, peanut oil, salt, water, and harmless coloring matter, manufactured and sold for cooking, baking, and seasoning purposes; that said product, Southern Nut Product, is packed and sold only in one-pound cartons, a sample of which is attached hereto and made a part hereof; that in the said manu-
3 facture of Southern Nut Product, plaintiff buys the materials so used in manufacturing same from a great many persons

Further answering paragraph 13 of plaintiff's bill defendant admits that plaintiff wrote the Commissioner of Internal Revenue as set forth in said paragraph, but defendant denies that the reply purported to have been written by R. M. Estes, Deputy Commissioner of Internal Revenue, was as set forth in said paragraph, and alleges that the same is misleading and not a true statement of facts for the reason that the balance of said letter states that the commissioner considers said products taxable and further advises that while said products are considered taxable no attempt is being made at the present time to collect the tax thereon.

23 Further answering paragraph 13 of plaintiff's bill, the defendant alleges that when the so-called cooking compound products were first submitted to the department for analysis the representation was made that these products were to be manufactured and sold as cooking compounds. An analysis of said products was made and the contents determined, and as a result thereof the Commissioner of Internal Revenue held said products to be artificially colored oleomargarine and within the purview of the act of August 2, 1886, as amended; that all of the manufacturers of said products who submitted samples, together with others who did not submit samples, proceeded to manufacture said products, and instead of placing said products upon the market as cooking compounds for baking and cooking said manufacturers immediately began to advertise to the world that said products were substitutes for butter and through their activities, a market was eventually created wherein these products began to show keen competition to butter and oleomargarine products, and as time went on more and more of the products began to appear upon the market under various and sundry names until the Higgins Manufacturing Company of Providence, Rhode Island, decided to test the question of the taxability of its product in court. The Higgins Company paid the tax on its product and brought suit to recover, and the court on the showing in that case determined that the product submitted was not made in imitation or semblance of butter or when so made calculated or intended to be sold as butter or for butter and that same did not have the flavor or texture of butter. The commissioner, however, contends that all of said products when made in imitation or semblance of butter or placed upon the market and sold in imitation or semblance of butter or have the texture and flavor of butter are taxable. It is true that subsequent to the trial of the

24 first Higgins case the department did write certain letters to various manufacturers giving them permission to go ahead and manufacture said products as cooking compounds. Each of said letters stated in substance that the department held the products when made in imitation or semblance of butter or calculated or intended to be sold as butter or for butter to be within the purview of the act, but that in view of certain court decisions various manufacturers had the same privilege of manufacturing the products as

cooking compounds as did the Higgins Manufacturing Company, it being expressly understood that the Higgins people had no right or permission to manufacture its products tax free if the same were to be placed on the market as butter substitutes or if same were calculated or intended to be sold as butter or for butter. The commissioner at no time held any of said products nontaxable, nor has the commissioner at any time overruled any decision which he has made, and it is affirmatively alleged that the commissioner has at all times contended that all the various cooking compounds which have been manufactured and placed on the market by various manufacturers have been and now are subject to the provisions of the oleomargarine act of August 2, 1886, as amended, when such products are shown to be manufactured and sold and intended and calculated to be manufactured and sold in imitation or semblance of butter or for butter or as butter, and the defendant herein affirmatively alleges that all of the products mentioned and described in plaintiff's bill were manufactured and sold and intended and calculated to be manufactured and sold not as cooking compounds but as butter or for butter and that the same were sold as butter and for butter, and in support thereof are attached hereto marked "Exhibit A" and made a part hereof by reference the affidavits of James H. Higgins, jr., and Jessie C. Francis, it being further affirmatively alleged that said products are not cooking compounds nor could the same be used as ordinary and recognized cooking compounds, but that when said products are used as cooking compounds they are used in the place of butter.

14. Answering paragraph 14 of the bill, defendant admits that Judge Barrett rendered a decision as set forth in said paragraph but denies that said cause or said decision involves the question of the taxability of said Southern Nut Product, and alleges that the same involves the question of misbranding under the Georgia State law.

Defendant further admits that an action was filed by plaintiff on or about November 1, 1929, against Peter H. Miller, collector of internal Revenue, Jacksonville, Florida, to restrain him from collecting a tax of ten cents per pound upon plaintiff's product known as Southern Nut Product and that on March 4, 1930, the Honorable Lake Jones rendered an opinion a copy of which is hereto attached, marked "Exhibit B" and made a part hereof by reference. That said court did not pass nor attempt to pass on the taxability of said products. Defendant affirmatively alleges that on or about the 15th day of April, 1930, the defendant in said action, Peter H. Miller, collector of internal revenue for the district of Florida, took an appeal from said decree rendered against him and in favor of the plaintiff to the Circuit Court of Appeals for the Fifth Circuit which appeal is now pending and that on or about the 15th day of April, 1930, the Honorable Lake Jones, district judge of the United States District Court for the Southern District of Florida at Jacksonville,

entered an order allowing said appeal and at the same time and place suspended during the pendency of said appeal the effect of said final decree. Copies of said appeal papers are attached hereto
26 and made a part hereof by reference and marked "Exhibit C." Said appeal is now being prosecuted and will be prosecuted to final decision in said circuit court.

15. In answer to paragraph 15 of plaintiff's bill, the defendant admits that the decree therein set forth was rendered by the United States District Court for the Southern District of Florida, and affirmatively alleges that said decree is not now in force and effect, but that the same has been suspended pending determination of said appeal taken from said decree to the United States Circuit Court of Appeals for the Fifth Circuit, and affirmatively alleges that Judge Jones in his opinion made no attempt whatsoever to pass upon the taxability of said product, and affirmatively alleges that there was no evidence of any character or description presented to the court in said proceeding upon which the court could pass upon the taxability.

16. In answer to paragraph 16 of plaintiff's bill, defendant states that on or about April 15, 1930, defendant received from Honorable Robert H. Lucas, Commissioner of Internal Revenue, Washington, D. C., advice to the effect that the commissioner held Southern Nut Product to be artificially colored oleomargarine and within the purview of the act of August 2, 1886, as amended, and, no court of competent jurisdiction having found said product nontaxable by virtue thereof, all dealers and persons handling said product within the district and State of Georgia were subject to special license taxes as such, and that upon such ruling from the Commissioner of Internal Revenue defendant proceeded to collect said taxes and license fees as he is authorized so to do in such cases as provided by the act of August 2, 1886, as amended, known as the oleomargarine law.

17. Answering paragraph 17 of plaintiff's bill, defendant denies the allegations therein set forth.

27 18. Answering paragraph 18 of plaintiff's bill, defendant denies the allegations therein contained.

19. Answering paragraph 19 of plaintiff's bill, defendant admits that section 2 of the act of August 2, 1886, is as set forth therein.

20. Answering paragraph 20 of plaintiff's bill, defendant denies the allegations therein contained.

Further answering plaintiff's bill of complaint, and as a separate and distinct answer thereto, defendant affirmatively alleges that this court is without jurisdiction to restrain the collection of the tax which has been asserted by the commissioner against said products and against the wholesalers and dealers handling the same on the ground and for the reason—

(a) The prohibition of section 3224 of the Revised Statutes of the United States, and

(b) The plaintiff and its dealers handling said product have a complete and adequate remedy at law.

Defendant, further answering plaintiff's bill of complaint and as a separate and distinct answer thereto, affirmatively alleges that the collection of taxes now sought to be enjoined are, and are hereby claimed as property of the United States and that the United States is the real party in interest in this litigation and is therefore, an indispensable party to this action, and not having been made a party this court has no jurisdiction to proceed with said cause.

Further answering plaintiff's bill of complaint and as a separate and distinct answer thereto, the defendant alleges that the United States is an indispensable party to said cause in that the matters and things complained of in plaintiff's petition can not be
28 fully determined and adjudicated without the United States being made a party by reason of the fact that the United States under the laws of the United States has a right to proceed to collect its revenue by suit, which is a method entirely separate and distinct from the threatened proceeding complained of against the collector, the defendant in this action.

Defendant, further answering plaintiff's bill of complaint and as a separate answer thereto, affirmatively alleges that the Commissioner of Internal Revenue being vested with discretionary powers under the provisions of section 14 of the act of August 2, 1886, as amended, and said commission having determined plaintiff's product to be a substance and mixture within the purview of said act and said commissioner having found that said product is artificially colored oleomargarine, and the tax thereon having been duly and regularly assessed by said commissioner according to law, and Southern Nut Product being different from the product that was before the District Court of the United States for the District of Rhode Island in the case of Higgins Manufacturing Company v. Page, Collector, Law No. 1548 of the records of that court, in that the product there before the court was packed in triangular-shaped packages and had an entirely different taste, texture, and color from Southern Nut Product, and in support of which there is attached hereto, marked "Exhibit D," and made a part hereof by reference the affidavit of George F. Beyers, Government chemist, who has analyzed and examined both Southern Nut Product and Higgins nut product, and by reason of Southern Nut Product being an entirely different product from the product before the court in the Higgins case and no court having determined Southern Nut Product to be nontaxable, this court is without jurisdiction to review the acts of the Commissioner
29 or to restrain the collection of dealers license taxes which become as a matter of law due and payable as a result of the commissioner's finding that said product is artificially colored oleomargarine and taxable.

Further answering plaintiff's bill of complaint and as a separate and distinct answer thereto, defendant affirmatively alleges that said bill of complaint fails to state a cause of action against this defend-

ant and further fails to disclose any interest, legal or otherwise, of plaintiff in the subject matter of said litigation, and by reason thereof the action should be dismissed.

Wherefore, having fully answered the plaintiff's bill of complaint, the defendant prays that the prayers of plaintiff's bill be denied; that no preliminary or permanent injunction issue as prayed for, and that the bill be dismissed with costs to the plaintiff.

CLINT W. HAGER,
United States Attorney.
C. F. GOREE,
Assistant United States Atty.
HANSON F. MCCOWEN,
Attorney, General Counsel's Office,
and Solicitors for Defendant.

[*Duly sworn to by Josiah T. Rose. Jurat omitted in printing.*]

30 *Exhibit A to answer*

STATE OF MASS.,
County of Suffolk, ss:

James W. Higgins and Jesse G. Francis, being both duly sworn according to law, depose and each for himself says:

That they are deputy collectors of internal revenue for the United States and are assigned to the investigation of violations and infractions of the oleomargarine law of the United States.

That they are familiar with various and sundry brands of so-called artificially colored cooking compounds, and are especially familiar with a certain product manufactured by the Standard Nut Margarine Company of Florida at Jacksonville, Florida, known as Southern Nut Product.

That during the course of their investigation they purchased on March 16, 1930, one pound of Southern Nut Product as butter from H. E. Ferguson, East Belmont, North Carolina, for which they paid forty cents; that on April 16, 1930, at Charlotte, North Carolina, they purchased Southern Nut Product as artificially colored oleomargerine from Chicago Market Store #80, 205–7 E. Trade Street, Charlotte, North Carolina, for which they paid the sum of thirty cents for said pound package; that on said date they also purchased Southern Nut Product as cheap butter from 50–50 Self-Service Store, 234 E. Trade Street, Charlotte, North Carolina,
31 for which they paid the price of thirty-three cents per pound package; that on April 17, 1930, they purchased Southern Nut Product as colored oleomargarine from F. C. Moore, 275 Ashland Avenue, Asheville, North Carolina, for which they paid thirty-five cents for a one-pound package; that on the same date they purchased one pound of Southern Nut Product from Teague's Market, 724 Haywood Road, Asheville, North Carolina, as colored oleomargarine and paid thirty-five cents for the one-pound package; that

on the same date they purchased one pound of Southern Nut Product as colored oleomargarine from Piggly-Wiggly-Williams Company Store No. 6, 252 Charlotte Street, Asheville, North Carolina, for which they paid thirty-four cents; that on April 18, 1930, they purchased one pound of Southern Nut Product as colored oleomargarine from Caldwell's Market, 1900 Main Street, Columbia, South Carolina, for which they paid a price of thirty-five cents for the one-pound package; that on the same date they purchased one-half pound of Southern Nut Product as butter from Threatts American Cafe, 1218 Taylor Street, Columbia, South Carolina, for which they paid the sum of thirty cents for the one-half pound; on the same date four butter pats of Southern Nut Product were served to us as butter at Threatts American Cafe, 1218 Taylor Street, Columbia, South Carolina, which butter pats of Southern Nut Product were served with dry toast; that on April 21, 1930, they purchased a one-pound package of Southern Nut Product as creamery butter from Dixie Stores, 920 Washington Street, Greenville, South Carolina, for which they paid thirty-five cents; that on the same date they purchased a one-pound package of Southern Nut Product as colored oleomargarine from Dixie Stores, Boucomb Road, Greenville, South Carolina, for which they paid thirty-five cents; that on the same date they purchased a one-pound package of
32 Southern Nut Product as nut butter from M. J. Worley, Boucomb Road, Greenville, South Carolina, for which they paid thirty-five cents; that on the same date they purchased a one-pound package of Southern Nut Product as colored oleomargarine from Dixie Stores, Rutherford Street, Greenville, South Carolina, for which they paid thirty-five cents; that on the same date they purchased a one-pound package of Southern Nut Product as good butter from the Piedmont Grocery, Rutherford Street, Greenville, South Carolina, for which they paid thirty-five cents; that on the same date they purchased a one-pound package of Southern Nut Product as cheap butter from Piggly Wiggly Store, 121 Main Street, Greenville, South Carolina, for which they paid thirty-five cents; that on the same date they purchased a one-pound package of Southern Nut Product as nut butter from Peoples Store, 9 Pendleton Street, West Greenville, South Carolina, for which they paid thirty-five cents; that on or about April 22, 1930, they purchased a one-pound package of Southern Nut Product as nut butter from Dutch Market, 161 Rutledge Avenue, Charleston, South Carolina, for which they paid thirty-five cents; that on or about April 22, 1930, the [they] purchased a one-pound package of Southern Nut Product as cheap butter from F. Seebeck, 107 Rutledge Avenue, Charleston, South Carolina, for which they paid thirty-five cents. That on or about April 22, 1930, they purchased a one-pound package of Southern Nut Product as good butter from C. Bowick, 82 Calhoun Street, Charleston, South Carolina, for which they paid forty cents; that on or about April 22, 1930, they purchased a one-pound package

of Southern Nut Product as butter from W. F. Groveman, 54 Chapel Street, Charleston, South Carolina, for which they paid thirty-nine cents; that on or about April 22, 1930, they purchased a one-
38 pound package of Southern Nut Product as butter from Tony Papoulos, Reed & Meeting Streets, Charleston, South Carolina, for which they paid thirty-five cents; that on April 26, 1930, they purchased a one-pound package of Southern Nut Product as colored oleomargarine from Clover Farms Stores, East Point, Georgia, for which they paid thirty-five cents; that on April 26, 1930, they purchased a one-pound package of Southern Nut Product as cheap butter from P. Aramson, 221 Forrest Avenue, Atlanta, Georgia, for which they paid thirty-five cents; that on April 26, 1930, they purchased a one-pound package of Southern Nut Product as nut butter from N. Warshaw, 51 W. Linden Avenue, Atlanta, Georgia, for which they paid thirty cents; that on April 30, 1930, the purchased a one-pound package of Southern Nut Product as good butter from C. H. Hutman, E. Broad and Julian Streets, Savannah, Georgia, for which they paid thirty cents; that on April 30, 1930, they purchased a one-pound package of Southern Nut Product as colored oleomargarine from S. Lowenkopt, E. Broad and President Streets, Savannah, Georgia, for which they paid thirty-five cents; that on April 30, 1930, they purchased a one-pound package of Southern Nut Product as cheap butter from C. Dulohery, 519 E. Broad Street, Savannah, Georgia, for which they paid thirty-five cents; that on April 30, 1930, they purchased one-half pound of Southern Nut Product as nut butter from Hubbard's, 37th and E. Broad Streets, Savannah, for which they paid twenty cents; that on April 30, 1930, they purchased a one-pound package of Southern Nut Product as nut butter from R. Oglesby, 40th & Drayton Streets, Savannah, Georgia, for which they paid thirty-five cents; that on May 1, 1930, they purchased a one-pound package of Southern Nut Product as colored oleomargarine from Kings Self Service Grocery #1, 1001 Broadway, Columbus, Georgia, for which they paid forty cents; that on May 2, 1930, they purchased a one-pound pack-
34 age of Southern Nut Product as cheap butter from Cooks Market #2, 122 W. Broad Street, Griffin, Georgia, for which they paid thirty-five cents; that on May 2, 1930, they purchased a one-pound package of Southern Nut Product as cheap butter from Brannon Grocery Company, 116 W. Broad Street, Griffin, Georgia, for which they paid thirty-five cents.

That all of said product so purchased was packed in packages similar in size and character to those ordinarily used manufacturers of creamery and dairy butter. That the contents of the packages were divided into four quarter-pound sticks, the same as butter is packed and sold upon the market, each quarter-pound stick being wrapped separately in tissue paper.

That on the 18th day of April, 1930, during the course of said investigation, we called on Threatts American Cafe, 1218 Taylor

Street, Columbia, South Carolina, and ordered a meal; there was served to us as butter what we later learned was Southern Nut Product; that as a result of securing such information the proprietor, L. I. Threatt, executed an affidavit to the effect that he was serving Southern Nut Product to his customers as butter, said affidavit being attached hereto and marked "Exhibit X."

That during the course of our investigation, on March 15, 1930, there appeared in the Savannah Morning News the following advertisement, which was published and distributed generally throughout the locality of Savannah Georgia:

"Southern Nut, better than butter. Try a 10¢ stick in comparison with the best creamery butter on hot biscuit or waffles. If you can tell the difference, I will refund the money, 35¢ pound. Ask your grocer or phone 3-3491."

35 Further affiant sayeth not.

JAMES W. HIGGINS, Jr.
JESSE G. FRANCIS.

Subscribed and sworn to before me this 14th day of May, 1930.

[SEAL.] JOHN T. HANSON,
Notary Public.

Exhibit X to affidavit

COLUMBIA, S. C., *April 19, 1930.*

This is to certify that I am the owner and manager of Threatts American Cafe located at 1218 Taylor St., Columbia, South Carolina, and that I am now and have been serving to my customers as butter with their meals, Southern Nut Product, packed in one (1) pound cartons of four (4) one-quarter (¼) pounds cubes individually wrapped, and that all of my customers seem to be satisfied as I have not as yet had a complaint.

(Signed) L. I. THREATT,
1218 Taylor St., Columbia, South Carolina.

Sworn and subscribed to this 19th day of April, 1930.

JESSE G. FRANCIS,
Deputy Collector.

Attest:

JAS. W. HIGGINS, Jr.,
Deputy Collector.

36 In United States District Court

Order continuing case until May 24, 1930

Filed May 9, 1930

It is ordered by the court that the hearing for preliminary injunction in this case be continued until May 24, 1930, at 10 o'clock a. m., and that defendant file his answer by May 20, 1930, and in the mean-

time refrain from taking any steps toward the collection of the oleomargarine license taxes sought to be enjoined by the petition herein.

This May 9, 1930.

SAM'L H. SIBLEY,
United States Judge.

We consent to the above order.

GEORGE N. MURDOCK,
JAS. C. DAVIS,
Solicitor for Plaintiff.
C. P. GOREE,
Assistant United States Attorney, and Solicitor for Defendant.

Order continuing case until May 24, 1930, omitted from the printed record, being heretofore copied at page 36.

* * * * * * *

In United States District Court

Opinion denying preliminary injunction

Filed June 2, 1930

37 Evidence and argument has been had on a motion for preliminary injunction to prohibit the collector of internal revenue for Georgia from "collecting or attempting to collect from the plaintiff, or any dealer selling plaintiffs product, Southern Nut Product, any pretended tax assessed under the oleomargarine act of August 2nd, 1886, as amended." The case made is that plaintiff manufacturers Southern Nut Product in Jacksonville, Florida, and has an established business in Georgia, with numerous jobbers and retailers who sell it and who are about to be taxed as such sellers on the ground that Southern Nut Product is oleomargarine under the definitions of section 2 of said act, and that dealers, for fear of the tax, are refusing to handle plaintiff's goods and its business is about to be destroyed. The contention is that taxed oleomargarine is based only on animal fats, and plaintiff's product contains only vegetable oils, and that several courts have so decided. The respondent's case is that the definition in section 2 of the act, properly construed includes imitations of butter made from vegetable oils, and that the Commissioner of Internal Revenue, under section 14 of the act, has held this product to be taxable, and that it is in fact made and sold as butter substitute. He denies that any court has finally adjudged plaintiff's product to be not taxable.

The controlling contentions are that R. S. 3224, now 26 U. S. Code 154, prohibits the granting of injunction; that there is an adequate remedy at law by paying the tax and suing for its recovery, and that plaintiff has no interest in the proposed tax against the dealers.

Considering the last contention first, while it is true that the plaintiff is not itself a dealer in Georgia so as to be taxed there, and while only the property of the dealer, or his interest in it, can be distrained

upon or can be forfeited under section 18 of the act, so that
38 plaintiff's physical property can not be affected, yet its interest in an established business is a property right the unlawful destruction of which a court of equity might properly prohibit. The plaintiff, though not the person directly proceeded against, may complain. Hewin v. Atlanta, 121 Ga. 723, 736; Traux v. Raich, 239 U. S. 33.

As to the presence of an adequate remedy at law the ruling must also be with the plaintiff. The remedy by suit and recovery of the tax is afforded to the dealer who is taxed, and not to the plaintiff, whose business is interfered with and who is not a party to the tax. The plaintiff has no legal right to pay the tax for the dealer or to use his name in a suit to recover it. The dealer may prefer not to involve himself in the controversy. Since the damage done would be really incapable of computation if the business were unlawfully destroyed, a case for interference by equitable prevention would generally exist. Compare Truax V. Raich, 239 U. S. 33.

26 U. S. Code 154 reads: "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any Court." The constitutionality of this prohibition was sustained in Pullan v. Kinsenger, Fed. Cas. 11463, and seems not to have been questioned since. Many of the discussions in cases applying it have dwelt upon the adequacy of the remedy offered by 26 U. S. Code 156, by payment of the tax and suit for its recovery, a remedy not applicable here. Nevertheless the positive, sweeping language of sec. 54, it seems to me, can not be judicially amended to except cases in which the remedy by payment and recovery is applicable. The effect of it is to withdraw from the courts the power to use the equitable remedy of an injunction to prevent the assessment or collection of any tax. The remedy of damages for any unlawful act of course remains. Whatever may be said concerning the Supreme Court,
39 which is established by and derives its powers from the Constitution, the district court is given its powers by Congress. Congress may not give it more power than the Constitution permits, but the court has only what the acts of Congress grant. United States vs. Hudson, 7 Cranch 32; Stevenson v. Fain, 195 U. S. 165. The remedy of original mandamus to coerce official action has been silently withheld. McIntire v. Wood, 7 Cranch 505; Covington Co. v. Hager, 203 U. S. 109. The remedy by injunction to interfere with one form of official action is here expressly withheld. Injunctive relief regardless of actual irremediable damage was much restricted in labor disputes by the Clayton Act, 29 U. S. Code, sec. 52. "Shall the thing formed say to him that formed it, Why hast thou made me thus?" If power is given it will be exercised by the court according to law, and constitutional law will be administered even against the expressed will of Congress, when the two conflict. But when power is withheld the district court can not exercise it no matter what private wrong may result. The Supreme Court has spoken somewhat vaguely of "extraordinary and entirely exceptional cir-

In United States District Court

Answer

Filed May 20, 1930

1. He admits the allegations of paragraph 1 of plaintiff's bill.
2. He admits the allegations of paragraph 2 of plaintiff's bill.
3. He admits the allegations of paragraph 3 of plaintiff's bill.
4. In answer to paragraph 4 of plaintiff's bill, defendant denies the allegations therein set forth and contained.
5. Answering paragraph 5 of the bill, defendant admits that plaintiff is engaged in the manufacture and sale of a nut product known as Southern Nut Product but denies it is manufactured and sold under its distinctive name; denies any knowledge or information sufficient to form a belief as to whether said name is in imitation of the distinctive name of any other product or not. He admits that the name is accompanied on the label or brand with the name of the place where it is manufactured and produced; admits that said product contains no added poisonous or deleterious ingredients; admits that said product is a mixture or compound consisting of cocoanut oil, peanut oil, salt, and harmless coloring matter, but denies that the same is manufactured and sold for cooking, baking, and reasoning purposes, and affirmatively alleges that said product is manufactured, sold, and calculated and intended to be manufactured and sold in imitation or semblance of butter and when so made is calculated and intended to be sold as butter or for butter; defendant admits that said Southern Nut Product is packed in one-pound cartons, but denies that knowledge or information sufficient to form a belief as to whether that is the only method or manner of packing said product; defendant denies any knowledge or information sufficient to form a belief as to whether plaintiff in the manufacture of said Southern Nut Product buys the materials so used in the said manufacture from a great many persons and firms located outside the State of Florida where the product is manufactured and sells and ships said product to a great number of firms and persons located in many States of the United States outside of the State of Florida, and, therefore, neither admits nor denies same, and demands strict proof thereof.
6. Answering paragraph 6 of plaintiff's bill, defendant denies that plaintiff has been engaged in the manufacture of said Southern Nut Product for a period of three years as alleged in said bill, and alleges that the plaintiff has not been engaged in such manufacture for a period of much over a year; defendant admits that plaintiff operates a plant and maintains offices in the city of Jacksonville; denies any knowledge or information sufficient to form a belief as to whether plaintiff had built up a reputation and standing for fair dealing with its customers and other people with whom it has done business, and demands strict proof thereof.

7. Answering paragraph 7 of plaintiff's bill, defendant admits that prior to plaintiff engaging in the manufacture and sale of said Southern Nut Product an action at law was brought
21 against one Page, collector of internal revenue for the district of Rhode Island for the recovery of taxes paid by the Higgins Manufacturing Company on a product known as Nut-Z-All. Denies said product was manufactured in the same way and of the same ingredients as Southern Nut Product is manufactured. The defendant admits that the decision in said case is found in volume 297 Federal Reporter, page 644.

8. Answering paragraph 8 of plaintiff's bill, defendant admits that Treasury Decision 3590 was promulgated and published, but as to whether or not all concerned were informed that Nut-Z-All had been held by the court as not to be oleomargarine, defendant denies any knowledge or information and neither admits nor denies the same, and demands strict proof thereof.

9. Answering paragraph 9 of plaintiff's bill, defendant admits that in June, 1924, an organization or association of oleomargarine manufacturers, known as the Institute of Margarine Manufacturers, maintained headquarters in Washington, D. C., and that inquiry was made by said institute to David H. Blair, then Commissioner of Internal Revenue, as to the taxability of said product Nut-Z-All; defendant admits that a letter set forth in paragraph 9, signed by R. M. Estes, deputy commissioner, was addressed to the Institute of Margarine Manufacturers, dated August 20, 1924.

10. Answering paragraph 10 of plaintiff's bill, defendant admits that Treasury Decision 4006 was promulgated and published, but alleges that said Treasury Decision 4006 was revoked according to law and that the same had been revoked for some considerable period of time before the filing of this action and is no longer in force and effect.

22 11. He admits the allegations of paragraph 11 of plaintiff's bill, save and except defendant denies injunction was asked for on similar products.

12. Answering paragraph 12 of plaintiff's bill, defendant admits that the Baltimore Butterine Company filed petition for injunction in the Supreme Court of the District of Columbia, but denies that the product Nu-ine manufactured by the Baltimore Butterine Company is the same as Southern Nut Product or that it is the same as Nut-Z-All. The defendant admits the court issued an injunction in said cause, but denies that the court passed upon the taxability of said products or was asked to pass upon the taxability of said products, and it is affirmatively alleged herein that the court was simply passing upon Regulation 4006.

13. Answering paragraph 13 of plaintiff's bill, defendant denies that plaintiff was warranted in believing, or that plaintiff did believe, that the taxability of its product had been judicially determined by the decision in the Higgins case or the decision of Justice Bailey in the Baltimore Butterine case.

cumstances" which may render the provisions of section 154 applicable, in Dodge v. Osborne, 240 U. S. 118 and Hill v. Wallace, 259 U. S. 44, but the actual decisions in these cases do not help this one. In the former the section was strictly applied. In the latter it was disregarded, but properly on the ground that the so-called taxes under the future trading act of August 24th, 1921, were really penalties, and that law was really a regulatory measure and not a tax act. Section 154 leaves but one question open in a case like the present, to-wit: Is the exaction a tax? The answer was negative in Hill v. Wallace, supra. So in numerous cases respecting so-called taxes under the national prohibition act. Lipke v. Lederer, 259 U. S. 557; Regal Drug Corp. v. Wardell, 260 U. S. 386. In Dodge v.
40 Brady, 240 U. S. 122, disregard of section 154 by the lower court in taking jurisdiction was condoned because a right result was reached in dismissing the bill on the merits, the point on controversy having meanwhile been settled by a decision of the Supreme Court itself. Many courts have held that an unconstitutional tax is not a tax within the meaning of such statutes, so that a controversy as to constitutionality can be accomplished by injunctive relief. But in Dodge v. Osborne, supra, it was held that injunction could not be had under this statute even in such a controversy. That impositions under the oleomargarine act are taxes and valed as such has been settled in In re Kollock, 165 U. S. 526, 536; McCray v. United States 195 U. S. 27. Whether one selling plaintiff's product is subject to the tax is the ordinary question of fact which arises under all tax acts, and which, under the scheme of Federal Law, is to be solved in the first instance by the tax officials without interference by Court injunctions. In Long v. Rasmussen, 281 Fed. 236, the injunction sought was not against the collection of the tax, but only to protect special property of a third person which had been wrongfully seized. In Higgins Mfg. Co. v. Page, 20 F(2) 948, the non-taxability of the very subject of litigation had been judicially determined in a suit between the same parties. The effort to tax notwithstanding the judgment made a very exceptional case. It is not this case, for the only litigation with this plaintiff about this product is still pending on appeal and has resulted in no final adjudication either way. The preliminary injunction must be refused.

This 2nd day of June, 1930.

SAM'L. H. SIBLEY,
U. S. Judge.

41 In United States District Court

Defendant's motion to dismiss suit

Filed Aug. 11, 1930

Now comes the above-named defendant, J. T. Rose, individually and as United States collector of internal revenue for the district

of Georgia by his solicitor, C. P. Goree, assistant United States attorney, and respectfully moves this honorable court to dismiss the above-named plaintiff's bill filed against this defendant in the above-entitled case on the 2nd day of May, 1930, upon the following ground, to wit:

This court has no power or authority to grant the relief prayed for in said bill of complaint, and is without jurisdiction to grant the same.

Wherefore, defendant prays judgment of the court.

C. P. GOREE,
Assistant U. S. Attorney and Solicitor for Defendant.

In United States District Court

Order dismissing case

Ordered and decreed that—
[redacted] foregoing motion be sustained and that said case be and the same [redacted] by dismissed—this September 19, 1930.

SAMUEL H. SIBLEY,
Judge U. S. Court.

42 In United States District Court

Petition for appeal

Filed Oct. 8, 1930

Now comes the Standard Nut Margarine Company of Florida, the plaintiff in the above-entitled cause, and respectfully shows the following facts:

Said cause was an action brought by the Standard Nut Margarine Company of Florida, a corporation, as complainant, against Josiah T. Rose, individually and as collector of internal revenue for the district of Georgia, to obtain a restraining order and an injunction restraining him from undertaking to collect a license tax from certain dealers in the State of Georgia handling a food product known as Southern Nut Product manufactured by complainant. A rule nisi was granted, and by agreement an order was taken prohibiting the collection of said license tax by defendant until the matter could be heard by the judge of the district court.

A hearing was had upon the prayer for preliminary injunction before the judge of the district court on the 24th day of May, 1930, and on June 2nd, 1930, said judge of the district court entered an order denying the preliminary injunction. Thereafter on the 19th day of September, 1930, the United States attorney filed in said court a motion to dismiss the petition in said case, and on the 19th day of September, 1930, the prayers of the motion to dismiss said

petition were granted by the district judge, and said petition was dismissed. Said judgment and decree dismissing said petition was final in the cause. Plaintiff contends that said judgment and decree was error, and that the court erred in dismissing the petition.

Now, therefore, comes the plaintiff, the Standard Nut Mar-
43 garine Company of Florida, and herewith prays an appeal to the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana, from the said judgment and decree rendered as aforesaid by the said district court, under the laws of the United States in such cases made and provided.

Petitioner submits and files herewith its assignment of errors upon the said judgment and decree.

Wherefore, the premises considered, your petitioner prays that an appeal in its behalf to the United States circuit court of appeals, aforesaid, situated at New Orleans, Louisiana, in said circuit, for the correction of the errors complained of, and herewith duly assigned, be allowed and granted; and that an order be had, fixing the amount of bond and security to be given by the defendant, as plaintiff in error, and conditioned as the law directs, and it prays a reversal of said judgment and decree.

THE STANDARD NUT MARGARINE COMPANY OF FLORIDA,
A Corporation.

By GEORGE N. MURDOCK,
JAMES C. DAVIS,
Its Solicitors and Attorneys at Law.

In United States District Court

Order allowing appeal

Filed Oct. 8, 1930

It appearing to the court in the cause stated in the above and foregoing petition for appeal that the Standard Nut Margarine Company of Florida, a corporation, has filed with said petition for appeal its assignment of errors,

44 It is hereby ordered by the court that the appeal prayed for, be, and the same is hereby allowed and granted to the United States Circuit Court of Appeals of the Fifth Circuit, at New Orleans, Louisiana, from the judgment and decree rendered in said cause, and that said plaintiff give a bond, with good and sufficient security, in the sum of $250.00 that it, as appellant, shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its plea good.

This October 8th, 1930.

SAML. H. SIBLEY,
United States Judge.

In United States District Court

Assignment of errors

Filed Oct. 8, 1930

And now comes the plaintiff in the above-entitled cause by George N. Murdock and James C. Davis, its attorneys, and in connection with its petition for appeal says that in the record, proceedings, and in the final judgment aforesaid, manifest error has intervened to the prejudice of the said plaintiff, and assigns as error upon which it will rely for its prosecution of the appeal in the above-entitled cause from said judgment made and entered by the honorable court of the 19th day of September, 1930, the following grounds, to wit:

1. The court erred in granting defendant's motion to dismiss on September 19th, 1930, upon each and every ground set forth in said motion, for the reason that the same is contrary to law, and plaintiff avers that said district court has the power and authority to grant the relief prayed for in said bill of complaint, and further
45 avers that said district court has jurisdiction to grant the same, and plaintiff avers that said district court erred in failing to so hold, and erred in failing to deny said motion to dismiss.

By reason whereof plaintiff prays that the judgment aforesaid may be reversed, etc.

GEORGE N. MURDOCK,
JAMES C. DAVIS,
Attorneys for Plaintiff.

(Bond on appeal approved and filed Oct. 9, 1930. Omitted in printing.)

47 In United States District Court

Praecipe for transcript of record

Filed Oct. 8, 1930

To the CLERK OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA:

Please prepare forthwith a certified transcript of the record of the above-entitled cause for the appeal filed therein by the plaintiff, the Standard Nut Margarine Company of Florida, from the judgment rendered therein and dated September 19th, 1929, to the United States Circuit Court of Appeals for the Fifth Circuit, which record consists of the following:

1. Petition, May 2, 1930.
2. Defendant's motion to strike and answer, May 20, 1930.
3. Order continuing case until May 24, 1930, May 9, 1930.
4. Opinion denying preliminary injunction, June 2, 1930.
5. Defendant's motion to dismiss, August 11, 1930, and order dismissing bill, September 19, 1930.

6. Petition for appeal, October 8, 1930.
7. Order allowing appeal, October 8, 1930.
8. Assignment of errors, October 8, 1930.
9. Citation, October 8, 1930.

48 10. Bond, October 8, 1930.
11. Praecipe, October 8, 1930.

GEORGE N. MURDOCK,
JAMES C. DAVIS,
Attorneys for Plaintiff.

It is hereby stipulated and agreed by and by the counsel for the parties to the above entitled cause that the above and foregoing praecipe calls for the preparation of the transcript of record in said case containing all matters necessary or proper for the consideration of said cause on appeal to the United States Circuit Court of Appeals for the Fifth Judicial Circuit.

Due and legal service of said praecipe is hereby acknowledged by the appellee in said cause this 8th day of October, 2930.

C. P. GOREE,
Attorney for Appellee,
Assistant U. S. Attorney.
GEORGE N. MURDOCK,
JAMES C. DAVIS,
Attorneys for Appellant.

49 (Clerk's certificate to foregoing transcript omitted in printing.)

Original citation omitted from the printed record, the original thereof being on file in the office of the clerk of the U. S. circuit court of appeals.

* * * * * * *

50 (Minute entry of argument and submission, February 23, 1931, omitted in printing.)

51 In United States Circuit Court of Appeals for the Fifth Circuit

No. 6065

THE STANDARD NUT MARGARINE COMPANY OF FLORIDA, APPELLANT

versus

JOSIAH T. ROSE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF GEORGIA, APPELLEE

Appeal from the District Court of the United States for the Northern District of Georgia

James C. Davis and George N. Murdock, for appellant.

C. P. Goree, assistant United States attorney, and Harrison F. McConnell, special attorney, Bureau of Internal Revenue (Clint W.

Hager, United States attorney, C. P. Goree, assistant United States attorney, Harrison F. McConnell, special attorney, Bureau of Internal Revenue, and C. M. Charest, general counsel, Bureau of Internal Revenue, on the brief), for appellee.

Before Foster, Hutcheson, and Walker, circuit judges.

Opinion of the Court, filed April 22, 1931

WALKER, *Circuit Judge:*

This is an appeal from a decree sustaining a motion to dismiss a bill in equity filed by the appellant against the appellee, the
52 collector of internal revenue for the district of Georgia. The appellant is the same corporation which was the plaintiff in the case of Miller, Collector of Internal Revenue, v. Standard Nut Margarine Co., MS. U. S. Circuit Court of Appeals, Fifth Circuit. The two cases are substantially alike, except that in the instant case the appellant, which is not a manufacturer or dealer in Georgia, seeks protection of its interest in an established business by restraining the enforcement against jobbers and retail dealers in Georgia in appellant's product, Southern Nut Product, of penalties imposed, or threatened to be imposed, on such jobbers or retailers for alleged violations of the oleomargarine act (26 U. S. C. A. §§ 543, 544) by selling appellant's product without complying with requirements of that act, while in the cited case appellant sought injunctive relief against the threatened enforcement of a tax attempted to be assessed against itself under that act.

It appears from the opinion rendered by the district judge that he concluded that appellant, though not directly proceeded against in Georgia, may complain of threatened proceedings against jobbers and retail dealers in that State who handle appellant's product, and that appellant had no adequate legal remedy for the redress of the alleged wrongs complained of; but that he concluded that,
53 though the allegations of appellant's bill showed a state of facts substantially like that disclosed by the allegations and proofs in the cited case, with the exception above mentioned, the statute providing that "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court" (26 U. S. C. A. §154) has the effect of forbidding the maintenance of this suit. The last-mentioned conclusion is at variance with a conclusion reached by this court in the above-cited case. For reasons stated in the opinion rendered in that case, we conclude that the above-mentioned ruling in the instant case was erroneous. Because of that error the decree appealed from is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed.

54 In United States Circuit Court of Appeals

THE STANDARD NUT MARGARINE COMPANY OF FLORIDA

versus

JOSIAH T. ROSE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF GEORGIA

No. 6065

Judgment

April 22, 1931

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Georgia and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said district court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said district court for further proceedings not inconsistent with the opinion of this court.

55 In United States Circuit Court of Appeals for the Fifth Circuit

(Title omitted.)

Order staying mandate

Filed May 12, 1931

On consideration of the application of the appellee in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable appellee to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, it is ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that the certiorari petition, record and brief have been filed, and that due proof of service of notice thereof under paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 12th day of May, 1931.

(Signed) RUFUS E. FOSTER,
United States Circuit Judge.

56 (Clerk's certificate to foregoing transcript omitted in printing.)

57 Supreme Court of the United States

Order allowing certiorari

Filed October 19, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(Indorsed on cover:) File No. 36066. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 252. Josiah T. Rose, Collector of Internal Revenue for the District of Georgia, petitioner, vs. The Standard Nut Margarine Company of Florida. Petition for a writ of certiorari and exhibit thereto. Filed July 22, 1931.

U. S. GOVERNMENT PRINTING OFFICE: 1931

FILE COPY

Office Supreme Court, U. S.
FILED
JUL 29 1931
CHARLES ELMORE CROPLEY
CLERK

No. 252

In the Supreme Court of the United States

OCTOBER TERM, 1931

JOSIAH T. ROSE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF GEORGIA, PETITIONER

v.

THE STANDARD NUT MARGARINE COMPANY OF FLORIDA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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68280—31

In the Supreme Court of the United States

OCTOBER TERM, 1931

No. ——

JOSIAH T. ROSE, COLLECTOR OF INTERNAL REVENUE for the District of Georgia, petitioner

v.

THE STANDARD NUT MARGARINE COMPANY OF Florida

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the petitioner, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit entered in the case between the above-named parties on April 22, 1931. (R. 51–52.)

OPINIONS BELOW

The opinion of the District Court for the Northern District of Georgia (R. 36–40) was filed June 2, 1930, and has not been reported. The opinion of the Circuit Court of Appeals (R. 50–51) is reported in 49 F. (2d) 85.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 22, 1931. (R. 51–52.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Where the Commissioner of Internal Revenue has determined that a tax is imposed upon a certain product as oleomargarine, under the Act of August 2, 1886, c. 840, 24 Stat. 209 (U. S. C., Title 26, Sec. 541), may a suit in equity for the sole purpose of restraining collection be maintained on the ground that no tax is imposed under a proper construction of the law, despite the prohibition of Section 3224 of the Revised Statutes?

2. Did the court below err in finding that the product of the respondent was not oleomargarine within the meaning of the Act of August 2, 1886?

STATUTES INVOLVED

Section 3224 of the Revised Statutes (U. S. C., Title 26, Sec. 154) provides:

> No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

Section 267 of the Judicial Code, c. 231, 36 Stat. 1087, 1163 (U. S. C., Title 28, Sec. 384) provides:

> Suits in equity shall not be sustained in any court of the United States in any case

where a plain, adequate, and complete remedy may be had at law.

The Act of August 2, 1886, c. 840, 24 Stat. 209 (U. S. C., Title 26, Sec. 541), provides in part:

> SEC. 2. That for the purposes of this act certain manufactured substances, certain extracts, and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known and designated as "oleomargarine," namely: All substances heretofore known as oleomargarine, oleo, oleomargarine-oil, butterine, lardine, suine, and neutral; all mixtures and compounds of oleomargarine, oleo, oleomargarine-oil, butterine, lardine, suine, and neutral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow, beef-fat, suet, lard, lard-oil, vegetable-oil amotto, and other coloring matter, intestinal fat, and offal fat made in imitation or semblance of butter, or when so made, calculated or intended to be sold as butter or for butter.

STATEMENT

The respondent taxpayer is a Florida corporation engaged in the manufacture and sale of a product known as "Southern Nut Product," a mixture or compound consisting of cocoanut oil, peanut oil, salt, water, and harmless coloring matter. (R. 1, 2.) Prior to the commencement of this action and on or about April 15, 1930, the Commissioner of Internal Revenue held that the said compound was taxable as artificially colored oleomargarine,

whereupon the petitioner proceeded to collect taxes and license fees as provided by the oleomargarine law (Act of August 2, 1886, c. 840, 24 Stat. 209 (U. S. C., Title 26, Sec. 541)). (R. 13, 26.) This action was brought to restrain collection of any further tax on the "Southern Nut Product."

The bill of complaint (R. 14) alleges that "Southern Nut Product" is not oleomargarine as that term is defined in Section 2 of the Oleomargarine Act, *supra,* and that its taxation is therefore not justified or authorized by said Act. Petitioner's answer to the bill of complaint alleged that "Southern Nut Product" was artificially colored oleomargarine and was taxable. (R. 28.)

A preliminary injunction was denied by the District Court of the United States for the Northern District of Georgia (R. 36), and petitioner's motion to dismiss the bill was granted. (R. 41.) The respondent appealed to the United States Circuit Court of Appeals for the Fifth Circuit, which reversed the District Court.

SPECIFICATION OF ERRORS TO BE URGED

1. The Circuit Court of Appeals erred in holding that an injunction should have been granted notwithstanding the prohibition of Section 3224 of the Revised Statutes.

2. The Circuit Court of Appeals erred in holding that the product of the respondent was not taxable as oleomargarine under the Act of August 2, 1886, c. 840, 24 Stat. 209.

REASONS FOR GRANTING THE WRIT

This case presents the same questions as those involved in No. ——, *Peter H. Miller, Individually and as Collector of Internal Revenue for the District of Florida, Petitioner,* v. *The Standard Nut Margarine Company of Florida, a Corporation,* in which a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is filed simultaneously herewith. The same reasons for granting the writ apply to this case, and petitioner's brief in support of the petition in the *Miller case* is applicable to both cases. For the reasons urged in the *Miller case,* it is respectfully submitted that a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit should be granted in this case.

THOMAS D. THACHER,
Solicitor General.

JULY, 1931.

U. S. GOVERNMENT PRINTING OFFICE: 1931

FILE COPY

NOV

No. 252

In the Supreme Court of the United States

OCTOBER TERM, 1931

JOSIAH T. ROSE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF GEORGIA, PETITIONER

v.

THE STANDARD NUT MARGARINE COMPANY OF FLORIDA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 252

JOSIAH T. ROSE, COLLECTOR OF INTERNAL REVENUE for the District of Georgia, petitioner

v.

THE STANDARD NUT MARGARINE COMPANY OF Florida

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the District Court for the Northern District of Georgia (R. 22–24) was filed June 2, 1930, and has not been reported. The opinion of the Circuit Court of Appeals (R. 28–29) is reported in 49 F. (2d) 85.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 22, 1931. (R. 30.) The peti-

tion for a writ of certiorari was filed July 22, 1931, and was granted October 19, 1931. (R. 31.)

QUESTION PRESENTED

Where the Commissioner of Internal Revenue has assessed a tax upon a certain product as oleomargarine, under the Act of August 2, 1886, c. 840, 24 Stat. 209 (U. S. C., Title 26, Sec. 541), may a suit in equity, for the sole purpose of restraining collection of the tax assessed, be maintained when the real ground of the suit is that the statute, properly construed, does not authorize the assessment of a tax upon the product in question?

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are contained in the petitioner's brief filed in *Peter H. Miller* v. *Standard Nut Margarine Co.*, No. 251, October Term, 1931.

STATEMENT

The respondent taxpayer is a Florida corporation engaged in the manufacture in Florida and sale in many States, including Georgia, of a product known as Southern Nut Product, a mixture or compound consisting of cocoanut oil, peanut oil, salt, water, and harmless coloring matter. (R. 1, 2, 8.) Prior to the commencement of this action and on or about April 15, 1930, the Commissioner of Internal Revenue held that the said compound

was taxable as artificially colored oleomargarine, whereupon the petitioner proceeded to collect taxes and license fees from dealers and persons handling said product in the State of Georgia as provided by the oleomargarine law (Act of August 2, 1886, c. 840, 24 Stat. 209 (U. S. C., Title 26, Sec. 541)). (R. 8, 16.) This action was brought to restrain collection of any further tax on the "Southern Nut Product."

The bill of complaint alleges (R. 9) that "Southern Nut Product" is not oleomargarine as that term is defined in Section 2 of the Oleomargarine Act, *supra,* and that its taxation is therefore not justified or authorized by said Act. Petitioner's answer to the bill of complaint alleged that "Southern Nut Product" was artificially colored oleomargarine and was taxable. (R. 17.)

A preliminary injunction was denied by the District Court of the United States for the Northern District of Georgia (R. 22), and petitioner's motion to dismiss the bill was granted. (R. 25.) The respondent appealed to the United States Circuit Court of Appeals for the Fifth Circuit, which reversed the District Court. (R. 29.)

SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred in holding that an injunction should have been granted notwithstanding the prohibition of Section 3224 of the Revised Statutes.

ARGUMENT

The question involved is the same as that in No. 251, *Peter H. Miller, Individually and as Collector of Internal Revenue for the District of Florida, Petitioner,* v. *The Standard Nut Margarine Company of Florida, a Corporation,* and the petitioner's brief in that case, filed simultaneously herewith, discusses the principles of law applicable to both cases.

There is an immaterial difference in the status of the respondent in the two cases. In the *Miller* case respondent manufactured its product and was directly liable for the manufacturer's tax in the collection district of Florida. In this case it is not directly liable in the district of Georgia, but the persons to whom it sells are subject to tax as dealers in oleomargarine. We submit that this does not affect the question involved. The bill of complaint shows that respondent is directly and primarily liable for the tax in another district (R. 1–2), and this action, therefore, is none the less one to restrain the collection of a tax.

The status of respondent in this case is to be distinguished from that of the plaintiff in *Long* v. *Rasmussen,* 281 Fed. 236 (Mont.) (*Cf. Ralston* v. *Heiner,* 21 F. (2d) 494 (W. D. Pa.), affirmed, 24 F. (2d) 416 (C. C. A. 3d), certiorari denied, 277 U. S. 608), whose property was being distrained for taxes to which she was a stranger. This case likewise differs from *Pollock* v. *Farmers' Loan &*

Trust Co., 157 U. S. 429, and similar cases where stockholders sought to compel the performance of fiduciary obligations resting on their respective corporations.

For the reasons urged in petitioner's brief in No. 251 the judgment of the court below should be reversed.

Respectfully submitted.

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NOVEMBER, 1931.

U. S. GOVERNMENT PRINTING OFFICE: 1931

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1931.

No. 252

JOSIAH T. ROSE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF GEORGIA,

Petitioner,

vs.

THE STANDARD NUT MARGARINE COMPANY OF FLORIDA,

Respondent.

MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The respondent, in opposition to the granting of the Writ prayed for by Petitioner, begs leave to present to the attention of this court the following facts as reasons why the writ should not be allowed.

STATEMENT.

Respondent submits the following as its conception of an accurate statement of the case (R. 1-17):

It is a Florida corporation and manufactured at its factory in Jacksonville, Florida, a product known as Southern Nut Product, which consisted of coconut oil, peanut oil, salt, water and coloring matter (R. 2). Petitioner seeks to collect from respondent's dealers in the State of Georgia the annual special license tax of $480 from wholesalers and $48 from retailers of the product as a special tax on the sale of artificially colored oleomargarine.

An identical product, known as Nut-Z-All, manufactured and sold by the Higgins Mfg. Co. of Providence, R. I. had been held not to be oleomargarine by Judge Brown of the District Court of Rhode Island, decided April, 1924 (*Higgins* v. *Page*, 297 Fed. 644, R. 3). The Government did not appeal the case, but disseminated the court's decision in the form of a treasury decision, T. D. 3590 (R. 4). The Commissioner of Internal Revenue informed oleomargarine manufacturers that such products were not taxable as oleomargarine (R. 4, 5).

Other identical products came on the market and the attempt of the revenue department to tax them as oleomargarine by T. D. 4006 (R. 5) was enjoined by Judge Lowell in the District Court of Rhode Island, July, 1927 (*Higgins* v. *Page*, 20 Fed. (2d) 948) (R. 6, 7), and Justices Bailey and Hoehling of the Supreme Court of the District of Columbia (Opinion unpublished, R. 8, 9).

Respondent then sought permission of the Commissioner of Internal Revenue to manufacture an identical product under the trade name of Southern Nut Product, and was informed by letter that it had the same right to manufacture

such a product tax-free as those manufacturers who had received favorable court decisions (R. 10). Respondent proceeded to manufacture and sell Southern Nut Product. Judge Barrett of the District Court of the Southern District of Georgia held in a state case (*Baltimore Buttermilk Co.* v. *Talmadge,* 32 Fed. 2, 904, May, 1929) that Southern Nut Product was not an imitation of butter (R. 10, 11).

The Collector of Internal Revenue at Jacksonville, Florida, attempted to tax Southern Nut Product as oleomargarine, and in March, 1930, was enjoined from so doing by Judge Jones of the District Court of Florida (R. 12, 13). The Commissioner of Internal Revenue did not believe such products taxable as oleomargarine and so informed Congress. Congress did not believe such products taxable and amended the oleomargarine law to include such products, such amendment to become effective July 10, 1931. (*Miller* v. *Standard Nut Margarine Co. of Florida,* 49 Fed. (2d). 79).

Notwithstanding all these facts, petitioner, Collector of Internal Revenue for Georgia, attempted to compel respondent's dealers in Georgia to pay license taxes as dealers in artificially colored oleomargarine (R. 13). Rather than pay such an unreasonable and exorbitant demand, such dealers refused to handle Southern Nut Product, and respondent's valuable business in that state was threatened with destruction. The bill for injunction herein was filed in the District Court for the Northern District of Georgia, but the injunction was refused by the District Court relying upon R. S. 3224, but that court did grant an injunction pending appeal. The court expressed no opinion as to whether the product was oleomargarine but relied entirely upon the prohibition of the statute. The decision of the District Court refusing injunctive relief was reversed by the Circuit Court of Appeals of the 5th Circuit (49 Fed. (2d) 85). It is this decision that petitioner seeks to have reviewed.

Comment Upon Petition.

Petitioner appears to have missed the point in this case and to have proceeded upon the theory that respondent is the "taxpayer" (See third word under Statement, p. 3 Petition), and that "this action was brought to restrain the collection of any further tax on Southern Nut Product" (p. 4, Petition).

This is not the situation. Respondent was *not* the taxpayer and there was no prayer to restrain the collection of any tax against it or its product, Southern Nut Product. Respondent sought to restrain the revenue officials from destroying its business in Southern Nut Product in Georgia, such destruction being accomplished by the said officials endeavoring to force respondent's dealers in Georgia to pay a license tax for the privilege of dealing in Southern Nut Product as upon dealers in artificially colored oleomargarine. The question as to whether Southern Nut Product was oleomargarine was not decided by the District Court.

Questions Presented.

The question, as respondent views it, is:

> *Is a District Court regardless of circumstances (extraordinary and exceptional or otherwise) prohibited by Sec. 3224 R. S. from restraining revenue officials from attempting the collection of a levy in the guise of a license tax upon wholesale and retail dealers in respondent's Southern Nut Product in the State of Georgia,*

when similar officials in the State of Florida have been enjoined by the District Court there from attempting to collect a levy under the guise of a manufacturers tax upon the same product under the same law; the court (Georgia) finding that respondent had a property right in Georgia, the destruction of which a court of equity might protect, and also that respondent had no adequate remedy at law, and that

the damage would be incapable of computation, (R. 38) respondent not being the taxpayer and being unable to comply with R. S. 3226 by paying the levy and suing to recover it back?

Respondent presents that the only question for consideration by the court is as to whether the circumstances as described constitute such exceptional and extraordinary circumstances under prior decisions of this court as to constitute an exception to R. S. 3224. *Hill* v. *Wallace,* 259 U. S. 44, 66 L. Ed. 822. *Bailey* v. *George,* 259 U. S. 16, 66 L. Ed. 816; *Dodge* v. *Brady,* 240 U. S. 122, 60 L. Ed. 560.

We direct this court's attention to the Memorandum in Opposition to the Petition for Writ of Certiorari filed in the case of *Peter H. Miller, Collector* v. *The Standard Nut Margarine Co. of Florida, Respondent,* No. 251, filed herewith, and point out that in addition to all the reasons there given in opposition to the writ and believed to constitute extraordinary and exceptional circumstances, the additional reason that in this case respondent is not the taxpayer and that petitioner was proceeding in defiance of a decision of the District Court of the Southern District of Florida which has enjoined similar officials there and which decision was at the time being appealed by the Government.

We present that the Circuit Court of Appeals did not err in holding that extraordinary and exceptional circumstances existed which constituted an exception to R. S. 3224 and that the petition should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1931.

No. 252

JOSIAH T. ROSE, Collector of Internal Revenue for the District of Georgia,

Petitioner,

vs.

THE STANDARD NUT MARGARINE COMPANY OF FLORIDA,

Respondent.

BRIEF FOR RESPONDENT

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CHARLES ELMORE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1931.

No. 252

JOSIAH T. ROSE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF GEORGIA,

Petitioner,

vs.

THE STANDARD NUT MARGARINE COMPANY OF FLORIDA,

Respondent.

MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1931.

No. 252

JOSIAH T. ROSE, Collector of Internal Revenue for the District of Georgia,

Petitioner,

vs.

THE STANDARD NUT MARGARINE COMPANY OF FLORIDA,

Respondent.

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the District Court for the Northern District of Georgia denying respondent's bill for injunction is found in the record pages 22 to 24. The opinion of the Circuit Court of Appeals, reversing the decision of the District Court, is reported in 49 Fed. (2) 85.

QUESTION PRESENTED

The question, as respondent views it, is:

Is a District Court regardless of circumstances (extraordinary and exceptional or otherwise) prohibited by Sec. 3224 R. S. from restraining revenue officials from attempting the collection of a levy in the guise of a license tax upon wholesale and retail dealers in respondent's Southern Nut Product in the State of Georgia, which product has in several instances been held by courts not to be oleomargarine and not taxable as such and when similar officials in the State of Florida have been

enjoined by the District Court there from attempting to collect a levy under the guise of a manufacturers tax upon the same product under the same law; the court (Georgia) finding that respondent had a property right in Georgia, the destruction of which a court of equity might protect, and also that respondent had no adequate remedy at law, and that the damage would be incapable of computation, (R. 38) respondent not being the alleged taxpayer and would be unable to comply with R. S. 3226 by paying the levy and suing to recover it back, even if it had been a tax?

Respondent presents that the only question for consideration by the court is as to whether the circumstances as described constitute such exceptional and extraordinary circumstances under prior decisions of this court as to constitute an exception to R. S. 3224. Hill v. Wallace, 259 U. S. 44, 66 L. Ed. 822. Bailey v. George, 259 U. S. 16, 66 L. Ed. 816; Dodge v. Brady, 240 U. S. 122, 60 L. Ed. 560.

We direct this court's attention to the brief filed in the case of Peter H. Miller, Collector v. The Standard Nut Margarine Co. of Florida, Respondent, No. 251, filed herewith, and point out that in addition to all the reasons there given and believed to constitute extraordinary and exceptional circumstances, the additional reason that in this case respondent is not the alleged taxpayer and that petitioner was proceeding in defiance of a decision of the District Court of the Southern District of Florida which had enjoined similar officials there and which decision was at the time being appealed by the Government.

STATUTES INVOLVED

There is involved in this appeal a construction of Sec. 3224 Revised Statutes, 26 U. S. C. A. 154.

STATEMENT

Respondent submits the following as its conception of an accurate statement of the case (R. 1-17):

It is a Florida corporation and manufactured at its factory in Jacksonville, Florida, a product known as Southern Nut Product, which consisted of coconut oil, peanut oil, salt, water and coloring matter (R. 1). Petitioner sought to force respondent's dealers in the State of Georgia to pay an annual special license tax of $480 by wholesalers, and $48 by retailers of the product as a special tax on the sale or artificially colored oleomargarine.

An identical product, known as Nut-Z-All, manufactured and sold by the Higgins Mfg. Co. of Providence, R. I., had been held not to be oleomargarine by Judge Brown of the District Court of Rhode Island, decided April, 1924 (Higgins v. Page, 297 Fed. 644, R. 2). The Government did not appeal the case, but disseminated the court's decision in the form of a treasury decision, T. D. 3590 (R. 2). The Commissioner of Internal Revenue informed oleomargarine manufacturers that such products were not taxable as oleomargarine (R. 3).

Other identical products came on the market and the attempt of the revenue department to tax them as oleomargarine by T. D. 4006 (R. 3) was enjoined by Justices Bailey and Hoehling of the Supreme Court of the District of Columbia (Opinion unpublished, R. 5) and an attempt to tax the Higgins product was enjoined by Judge Lowell in the District Court of Rhode Island, July, 1927 (Higgins v. Page, 20 Fed. (2d) 948) (R. 4) and later by Justice Adkins in the Supreme Court of the district of Columbia. (Petitioners Brief in Miller v. Standard Nut Margarine Co. No. 251, p. 45-47).

Respondent then sought permission of the Commissioner of Internal Revenue to manufacture an identical product under the trade name of Southern Nut Product, and was informed by the Commissioner of Internal Revenue by letter that it had the same right to manufacture such a product tax-free as those

manufacturers who had received favorable court decisions (R. 6). Respondent proceeded to manufacture and sell Southern Nut Product. Judge Barrett of the District Court of the Southern District of Georgia held in a state case (Baltimore Butterine Co. v. Talmadge, 32 Fed. (2), 904, May 1929) that Southern Nut Product was not an imitation of butter (R. 7), and was not oleomargarine, as defined by Federal Law.

The Collector of Internal Revenue at Jacksonville, Florida, attempted to tax Southern Nut Product as oleomargarine, and in March, 1930, was enjoined from so doing by Judge Jones of the District Court of Florida (R. 8, 9). The Commissioner of Internal Revenue did not believe such products taxable as oleomargarine and so informed Congress. Congress did not believe such products taxable and amended the definition of oleomargarine to include such products, such amendment to become effective July 10, 1931. (Miller v. Standard Nut Margarine Co. of Florida, 49 Fed. (2d) 79).

Notwithstanding all these facts, petitioner, Collector of Internal Revenue for Georgia, attempted to compel respondent's dealers in Georgia to pay license taxes as dealers in artificially colored oleomargarine (R. 8). Rather than pay such an unreasonable and exorbitant demand, such dealers refused to handle Southern Nut Product, and respondent's valuable business in that state was threatened with destruction. The bill for injunction herein was filed in the District Court for the Northern District of Georgia, (R. 1-11), but the injunction was refused by the District Court relying upon R. S. 3224 (R. 22-24). A motion of defendant to dismiss was granted (R. 25) and respondent appealed therefrom to the Circuit Court of Appeals for the Fifth Circuit. The court did grant an injunction pending appeal. The court expressed no opinion as to whether the product was oleomargarine but relied entirely upon the assertion of petitioner that it was a tax and upon the prohibition of the statute relating to "taxes." The decision of the District Court refusing injunctive relief

was reversed by the Circuit Court of Appeals of the 5th Circuit (49 Fed. (2d) 85). It is this decision that petitioner seeks to have reviewed.

ARGUMENT

The court below (R. 23) found that respondent's business with its dealers in the State of Georgia is a property right, the destruction of which a court of equity might properly protect.

> HEWIN v. ATLANTA, 121 Ga. 723, 736
> TRUAX v. RAICH, 239 U. S. 33.

That court (R. 23) also found that respondent had no adequate remedy at law under Sec. 156, 26 U. S. C. A. since not being the taxpayer, the statutes for payment and suit to recover were not available, and that the damage done would have been incapable of computation.

The District Court based its refusal to grant the injunctive relief sought solely because of the prohibition of Sec. 3224 R. S. and held that because of that statute it was without power to grant the relief to which it was admitted respondent was entitled. The District Court refused to consider the rule laid down by this court that the statute does not prevent an injunction in a case apparently within its terms in which some extraordinary and exceptional circumstances make its provisions inapplicable (Hill v. Wallace, 259 U. S. 44), and that the inhibition is absolute, notwithstanding the Revenue officials were proceeding to levy a tax in absolute defiance to decisions of the courts, that the product was not taxable.

If such is the law the rulings of the Bureau of Internal Revenue officials supersede court decrees, or as said by Judge Lowell, in Higgins v. Page, 20 F. (2) 948:

> "If it be true, as contended by the defendant that a tax may be collected, although it has been judicially de-

termined to be illegal, the result will be that the taxing authorities are entirely above and beyond the law,"

or, as said by Mr. Justice Bailey, (R. 5):

"There would be no end to litigation if the defendant should persist in levying a tax after the courts have held the tax invalid."

Justice Bailey might have well said there would be no purpose in litigation if the Revenue officials may persist in levying a tax even though the courts have held such tax illegal, and the citizen is entirely at the mercy of an executive department.

When this case reached the District Court, the following situation existed:

Judge Jones had in a case where this product and the product of the Higgins Mfg. Co. were both before him been satisfied, from personal inspection and testimony, that they were identical and since the Revenue Department was not attempting to tax the Higgins product, respondent was entitled to the same privilege.

Judge Barrett (32 Fed. (2) 902) had in a case before him held that Southern Nut Product was not an imitation of anything and was not oleomargarine.

Judge Brown (297 Fed. 644) had held that the Higgins product (identical to Southern Nut Product) was not made in imitation or semblance of butter and hence was not oleomargarine.

It is conclusive from the above judicial holdings based upon the facts, to say nothing of the instances where courts had theretofore restrained the Commissioner from attempting to tax these products, that the courts had decided the product was not oleomargarine under the law, and not being oleomargarine, no tax could be collected upon it.

Whether the demand was a penalty, a fine, or what not, it is certain it was not a tax, and the prayer was not to restrain the petitioner from collecting a tax but to restrain him from making any effort to apply the oleomargarine law with respect to Southern Nut Product as oleomargarine.

The District Court failed to appreciate that the courts had definitely decided that the product was not taxable and that he was not being asked to restrain the collection of any tax, and that therefore Sec. 3224 R. S. did not apply.

COMMENT UPON PETITIONER'S BRIEF

Petitioner appears to have missed the point in this case and to have proceeded upon the theory that respondent is the "taxpayer", and that "this action was brought to restrain the collection of any further tax on Southern Nut Product".

This is not the situation. Neither respondent or its dealers were taxpayers and there was no prayer to restrain the collection of any tax against it or its product, Southern Nut Product. Respondent sought to restrain the revenue officials from destroying its business in Southern Nut Product in Georgia, such destruction being accomplished by the said officials endeavoring to force respondent's dealers in Georgia to pay a license tax for the privilege of dealing in Southern Nut Product as upon dealers in artificially colored oleomargarine. The question as to whether Southern Nut Product was oleomargarine was not before the District Court and was not decided by the District Court.

The injunction sought was really to restrain the violation by petitioner of a valid existing injunction granted to respondent by the District Court of Florida.

CONCLUSION

We present that the Circuit Court of Appeals did not err in holding that extraordinary and exceptional circumstances existed which constituted an exception to R. S. 3224 and that the judgment of the Circuit Court of Appeals should be affirmed.

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SUPREME COURT OF THE UNITED STATES.

Nos. 251 and 252.—October Term, 1931.

Peter H. Miller, Individually and as Collector of Internal Revenue for the District of Florida, Petitioner, 251 *vs.* The Standard Nut Margarine Company of Florida.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.
Josiah T. Rose, Collector of Internal Revenue for the District of Georgia, Petitioner, 252 *vs.* The Standard Nut Margarine Company of Florida.	

[February 15, 1932.]

Mr. Justice Butler delivered the opinion of the Court.

No. 251.

Respondent, a manufacturer of "Southern Nut Product", brought this suit in the Southern District of Florida to restrain petitioner from collecting from respondent or from dealers selling its product, any tax purporting to be levied under the Oleomargarine Act of August 2, 1886, 24 Stat. 209, as amended by the Act of May 9, 1902, 32 Stat. 194. Petitioner answered denying the essential allegations of the complaint. Respondent applied for a temporary injunction, the court found that it would suffer irreparable injury unless petitioner be restrained pending the final disposition of the case and granted the application. At the trial respondent introduced oral and documentary evidence together with specimens of the product sought to be taxed. The court found that the material allegations of the complaint were established by the evidence and granted permanent injunction. The record states in condensed form the substance of the testimony but

does not contain the documents which were made exhibits and introduced in evidence. The Circuit Court of Appeals found, and it appears from the testimony brought up, that omitted exhibits constitute a material part of the evidence received and that the record is consistent with the trial court's conclusion in respect of the facts; it held R. S., § 3224, does not apply and affirmed the decree. 49 F. (2d) 79, 82, 85.

That section declares (26 U. S. C., § 154): "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court". This suit was commenced December 26, 1929. The complaint, the evidence contained in the record and documents of which judicial notice may be taken show the following facts:

In April, 1928, respondent commenced and thereafter carried on at Jacksonville, Florida, the manufacture and sale of Southern Nut Product. It contained no animal fat but was made exclusively of cocoanut oil, peanut oil, salt, water and harmless coloring matter; it was sold in one pound cartons for cooking, baking and seasoning. Respondent built up a valuable business in the sale of the product to dealers in Florida and other States.

In January, 1922, the Commissioner of Internal Revenue issued to the Higgins Manufacturing Company a permit to manufacture and sell "Nut-Z-All" without paying the oleomargine tax thereon. He revoked the permit in December of the same year and purported to assess such a tax upon some of that product. The company, having paid it under protest to the collector in Rhode Island, brought an action against him in the United States district court for that State to recover the amount so exacted. After hearing evidence, including the testimony of chemists in the Bureau of Internal Revenue called in behalf of the collector, the court in April, 1924, found that the product was not made in imitation or semblance of butter, was not intended to be sold as or for butter and was not oleomargarine or taxable as such. 297 Fed. 644. Thereupon the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury promulgated the court's decision as Treasury Decision 3590, thus informing all concerned that the product was not subject to the tax.

In August, 1924, the deputy commissioner, in answer to an inquiry made by the Institute of Margarine Manufacturers as to the

taxability of "Nut-Z-All", sent a letter stating: "The court, having held the product to be not taxable as oleomargarine, the fact that retailers advertise and sell it as butter, or as a substitute for butter, would not render them or the manufacturers liable under the internal revenue law".

April 1, 1927, the Commissioner, contrary to the court's decree, Treasury Decision 3590 and his deputy's response to the Institute's inquiry, promulgated Treasury Decision 4006 which declared products similar to "Nut-Z-All" taxable as oleomargarine if colored to look like butter. Then the Higgins Manufacturing Company brought suit in the federal court for Rhode Island to restrain the collector from enforcing the tax on its product. The court, upon the allegations of the complaint admitted by motion to dismiss, found that the facts there alleged in respect of taxability were identical with those shown in the earlier case; that the collector was threatening to enforce the tax which had been adjudged illegal; that if the tax should be collected plaintiff's business would be ruined and, July 18, 1927, granted temporary injunction, 20 F. (2d), 948, which was made permanent in December following.

In July, 1927, the Baltimore Butterine Company brought suit in the supreme court of the District of Columbia to enjoin the Commissioner and his deputy from enforcing the tax as declared in Treasury Decision 4006 against its product "Nu-ine" which was identical in content and appearance with "Nut-Z-All" made by the Higgins Manufacturing Company and Southern Nut Product made by respondent in this case. The court held the product not taxable and granted a permanent injunction.

No appeal was taken in any of the cases above mentioned. And the petitioner, by letter, answering an inquiry made by respondent, advised respondent that its product would not be taxable as oleomargarine.

Relying on the decision in *Higgins Mfg. Co.* v. *Page*, 297 Fed. 644, Treasury Decision 3590, the deputy commissioner's letter to the Institute and the injunctions above referred to, respondent believed the product which it proposed to manufacture and sell would not be taxable as oleomargarine and, upon receipt of petitioner's letter, commenced manufacture and sale of the product.

In 1928, pursuant to instructions sent him by the deputy com-

missioner stating that respondent's product was held taxable as colored oleomargarine, the petitioner demanded and threatened to collect a tax of ten cents a pound upon respondent's product. But petitioner made no effort to collect the tax on "Nut-Z-All" which at the time of the trial was being sold in Florida. Excluding the tax from cost, respondent's net profit was approximately three cents per pound. The enforcement of the Oleomargarine Act against respondent would impose a tax that respondent would be unable to pay, would subject it to heavy penalties and the forfeiture of its plant together with the materials and manufactured product on hand, and would destroy its business.

The complaint asserts that the exaction of ten cents per pound, while in the guise of a tax, is really a penalty imposed to eliminate competition with butter and is therefore in excess of the power granted to the Congress by the Constitution. But, having regard to *McCray* v. *United States*, 195 U. S. 27, 59, we treat the imposition laid by the Act upon oleomargarine as a valid excise tax. The rule that § 3224 does not extend to suits brought to restrain collection of penalties (*Lipke* v. *Lederer*, 259 U. S. 557, 562. *Regal Drug Co.* v. *Wardell*, 260 U. S. 386) does not apply.

Petitioner does not here assign as error the finding below that respondent's product was not oleomargarine. He seeks reversal upon the grounds that the statute forbids injunction against the collection of the tax even if erroneously assessed; that this assessment was made by the Commissioner under color of his office, was not arbitrary or capricious and that, if there is any exception to the application of § 3224, this case is not within it.

We are of opinion that, as held below and here claimed by respondent, the product in question was not taxable as oleomargarine defined by § 2 of the Act of 1886. It is as follows:

"That for the purposes of this act certain manufactured substances, certain extracts, and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known and designated as 'oleomargarine', namely: All substances heretofore known as oleomargarine, oleo, oleomargarine-oil, butterine, lardine, suine, and neutral; all mixtures and compounds of oleomargarine, oleo, oleomargarine-oil, butterine, lardine, suine, and neutral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow, beef-fat, suet, lard, lard-oil, vegetable-oil annotto, and other coloring matter, intestinal fat, and offal fat

made in imitation or semblance of butter, or when so made, calculated or intended to be sold as butter or for butter."

That definition remained in force until July 10, 1931. It was amended by the Act of July 10, 1930, 46 Stat. 1022, effective twelve months later, the material parts of which are printed in the margin.* The hyphen in the phrase "vegetable-oil" was eliminated and a comma was inserted between those words and "annotto". Words added are shown in italics and words deleted are within brackets.

When the Act of 1886 was passed various imitations of and substitutes for butter, the principal ingredients of which were the fats of cattle and swine, were being manufactured and sold in large quantities. Products such as respondent's which contain no animal fat were unknown and were not made in substantial quantities until much later. There is nothing in the Act, or that has been brought to our attention, to suggest that Congress anticipated the development of the art later to occur. Annotto had long been used to color butter and cheese and was then being used to make oleomargarine resemble butter. It is a coloring material found in association with the oil content of the covering of certain tree seeds. When prepared for sale and use the colorant is contained in a stiff oily mass that was then well-known in the market. The words "vegetable-oil annotto" appropriately describe that substance. The hyphen between "vegetable" and "oil" and the absence of any punctuation mark following them signify that the words so compounded qualify "annotto" and indicate that such coloring material was meant. And that construction is strongly

*"Sec. 2. That for the purposes of this Act certain manufactured substances, certain extracts, and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known and designated as 'oleomargarine', namely: All substances heretofore known as oleomargine, oleo, oleomargine oil, butterine, lardine, suine, and neutral; all mixtures and compounds of oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and neutral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow, beef fat, suet, lard, lard oil, *fish oil or fish fat*, vegetable oil, annatto, and other coloring matter, intestinal fat, and offal fat;—*if* (1) made in imitation or semblance of butter, or [when so made] (2) calculated or intended to be sold as butter or for butter, *or* (*3*) *churned, emulsified, or mixed in cream, milk, water, or other liquid, and containing moisture in excess of 1 per centum or common salt.* . . ."

supported by the use in the same connection of the words "and other coloring matter."

Regulations promulgated under the Act omit the hyphen and add a comma thus making the phrase to read "vegetable oil, annotto". The Commissioner's determination that respondent's product is oleomargarine necessarily was based on that version. It is elementary that tax laws are to be interpreted liberally in favor of taxpayers and that words defining things to be taxed may not be extended beyond their clear import. Doubts must be resolved against the Government and in favor of taxpayers. *United States* v. *Merriam*, 263 U. S. 179, 188. *Bowers* v. *N. Y. & Albany Co.*, 273 U. S. 346, 350. The legislative history and passage of the amendatory Act of 1930 show that the Commissioner as well as the Congress found that an enlargement of the definition was necessary in order to cover products such as respondent's. The language used in the original Act was not sufficiently clear and definite to include products containing no animal fat. The Commissioner's rendition of the governing phrase was without warrant. His determination that respondent's product was oleomargarine and taxable under the Act was erroneous and, in view of his earlier interpretations and the court decisions which had become final, must be held arbitrary and capricious. It was without force. *Interstate Commerce Commission* v. *Louis. & Nash. R. R. Co.*, 227 U. S. 88, 91. *Kwock Jan Fat* v. *White*, 253 U. S. 454, 457, 464. *United States* v. *Mann*, 2 Brock. 9, 11.

Independently of, and in cases arising prior to, the enactment of the provision (Act of March 2, 1867, 14 Stat. 475) which became R. S., § 3224, this court in harmony with the rule generally followed in courts of equity held that a suit will not lie to restrain the collection of a tax upon the sole ground of its illegality. The principal reason is that, as courts are without authority to apportion or equalize taxes or to make assessments, such suits would enable those liable for taxes in some amount to delay payment or possibly to escape their lawful burden and so to interfere with and thwart the collection of revenues for the support of the government. And this court likewise recognizes the rule that, in cases where complainant shows that in addition to the illegality of an exaction in the guise of a tax there exist special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity

jurisprudence, a suit may be maintained to enjoin the collector. *Dows* v. *City of Chicago*, 11 Wall. 108. *Hannewinkle* v. *Georgetown*, 15 Wall. 547. *State Railroad Tax Cases*, 92 U. S. 575, 614. Section 3224 is declaratory of the principle first mentioned and is to be construed as near as may be in harmony with it and the reasons upon which it rests. *Cumberland Telephone & Telegraph Co.* v. *Kelly*, 160 Fed. 316, 321. *Baker* v. *Baker*, 13 Cal. 87, 95. *Bradley* v. *The People*, 8 Colo. 599, 604. 2 Sutherland, 2nd Lewis ed., § 454. The section does not refer specifically to the rule applicable to cases involving exceptional circumstances. The general words employed are not sufficient, and it would require specific language undoubtedly disclosing that purpose, to warrant the inference that Congress intended to abrogate that salutary and well established rule. This court has given effect to § 3224 in a number of cases. *Snyder* v. *Marks*, 109 U. S. 189, 191. *Dodge* v. *Osborn*, 240 U. S. 118, 121. *Dodge* v. *Brady*, 240 U. S. 122. It has never held the rule to be absolute, but has repeatedly indicated that extraordinary and exceptional circumstances render its provisions inapplicable. *Hill* v. *Wallace*, 259 U. S. 44, 62. *Dodge* v. *Osborn, supra*, 12. *Dodge* v. *Brady, supra*. Cf. *Graham* v. *du Pont*, 262 U. S. 234, 257. *Brushaber* v. *Union Pacific R. R.*, 240 U. S. 1.

This is not a case in which the injunction is sought upon the mere ground of illegality because of error in the amount of the tax. The article is not covered by the Act. A valid oleomargarine tax could by no legal possibility have been assessed against respondent and therefore the reasons underlying § 3224 apply, if at all, with little force. *LeRoy* v. *East Saginaw Ry. Co.*, 18 Mich. 233, 238-239. *Kissinger* v. *Bean*, Fed. Cas. 7853. Respondent commenced business after the product it proposed to make had repeatedly been determined by the Commissioner and adjudged in courts not to be oleomargarine or taxable under the Act and upon the assurance from the Bureau that its product would not be taxed. For more than a year and a half respondent sold its product relying that it was not subject to tax. If required to pay the tax its loss would be seven cents per pound. Before the Commissioner's latest ruling respondent had made and sold so much that the tax would have amounted to more than it could pay. Petitioner acquiesced in the injunctions granted in Rhode Island and the District of Columbia and did not assess any tax upon identical

products contemporaneously being made by complainants in such suits and directed enforcement against respondent's entire product. Such discrimination conflicts with the principle underlying the constitutional provision directing that excises laid by Congress shall be uniform throughout the United States. It requires no elaboration of the facts found to show that the enforcement of the Act against respondent would be arbitrary and oppressive, would destroy its business, ruin it financially and inflict loss for which it would have no remedy at law. It is clear that, by reason of the special and extraordinary facts and circumstances, § 3224 does not apply. The lower courts rightly held respondent entitled to the injunction.

No. 252.

This case was decided in the Circuit Court of Appeals at the same time as No. 251 (49 F. (2d), 85) presents the same question and is governed by the foregoing opinion.

Decrees affirmed.

Mr. Justice STONE.

In my opinion, R. S. § 3224, which says that "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court," cannot rightly be construed as permitting the present suit, whose sole purpose is to enjoin the collection of a tax. Enacted in 1867, this statute, for more than sixty years, has been consistently applied as precluding relief, whatever the equities alleged.

Mr. Justice BRANDEIS joins me in this opinion.